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Research Papers

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Inquiry on Federal Water Policy
Research Paper #1

WATER LAW IN CANADA

Report on a workshop for the
Inquiry on Federal Water Policy

by

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THE INQUIRY ON FEDERAL WATER POLICY

The Inquiry on Federal Water Policy was appointed by the federal Minister of the Environment in January of 1984 under the authority of the Canada Water Act. The members were Peter H. Pearse, chairman; Françoise Bertrand, member; and James W. MacLaren, member. The Inquiry was required by its terms of reference to review matters of water policy and management within federal jurisdiction and to make recommendations.

This document is one of a series of research papers commissioned by the Inquiry to advance its investigation. The views and conclusions expressed in the research papers are those of the authors. Copies of research papers and information on the series may be obtained by writing to the Enquiry Centre, Environment Canada, Ottawa, Ontario K1A 0H3.

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Abstract

Water Law in Canada contains an overview of basic water law in Canada beginning with common law and civil law rules and explaining how these have been modified by statutory provisions. It then identifies water law issues that have legal implications and proceeds to examine a number of these in detail. In particular, because this publication is based on a workshop presented by the Westwater Research Centre, UBC, at the request of the Inquiry on Federal Water Policy, the issues examined are those that raise questions about the approrpiate role of the federal government in the management of Canada's water resources.

First among these are issues of constitutional law concerning the allocation of legislative and administrative responsibility with respect to the water resource itself, and with respect to related subjects such as navigation, fishing, agriculture and pollution. A federal role is clearly suggested in cases where river systems cross provincial or territorial boundaries, especially where upstream uses such as hydro-electric dams or diversions for irrigation reduce the water available downstream or produce harmful effects on water quality. While Canadian efforts to resolve these trans-boundary problems through court cases and inter-governmental agreements are described, the text makes it clear that many uncertainties remain. The characteristics of an ideal law governing interjurisdictional waters in Canada are described, and the optional roles which the federal government could play in implementing these ideal arrangements are identified.

Other issues canvassed in the text are northern water issues which, under present constitutional arrangements, are a responsibility of the federal government because of its direct ownership and legislative control over natural resources in the Yukon and Northwest Territories; Indian rights to water on reserve lands; and Canada/United States relations respecting boundary waters.

The text is written for the non-lawyer. For those wanting a more technical and detailed presentation of the various issues, the publication includes seven (7) appendices, being the papers prepared for the workshop by various water law experts in Canada. Their names and their particular topics are listed in the Table of Contents.

While the workshop was arranged at the request of the Inquiry, it was clearly understood that the views presented in this publication are solely those of the various authors and do not necessarily represent the opinions of the Inquiry members.

Résumé

Le rapport Water Law in Canada est un survol des lois fondamentales se rapportant aux eaux au Canada. La première partie de ce rapport est un aperçu des règles générales découlant du Common Law et du droit civil québécois et on y explique comment celles-ci ont été modifiées par des provisions statutaires. Les questions controversées du domaine de l'eau qui ont des implications légales sont ensuite abordées et certaines sont discutées en détails. Parce que ce rapport est le résultat d'un atelier préparé par le Westwater Research Centre de l'Université de la Colombie-Britannique, à la demande de l'Enquête sur la politique fédérale relative aux eaux, les sujets abordés sont tous reliés au rôle du gouvernement fédéral relativement à l'administration des ressources en eau Canadiennes.

Les premiers sujets de controverses discutés sont de nature constitutionnelle. Ils concernent l'attribution de responsabilités législatives et administratives dans les domaines de la navigation, des pêches, de l'agriculture et de la pollution. Un rôle fédéral est clairement suggéré lorsque les systèmes fluviaux traversent des frontières provinciales ou territoriales, spécialement lorsque les utilisations en amont (barrages hydro-électriques ou dérivations pour fins d'irrigation, par exemple) réduisent la quantité d'eau disponible en aval ou ont des effets néfastes sur sa qualité. Bien que les efforts Canadiens pour résoudre ces problèmes transfrontaliers par des décisions juridiques ou des accords intergouvernementaux soient décrits, le texte indique clairement que plusieurs incertitudes demeurent. Les caractéristiques d'une loi idéale qui permettrait de traiter les problèmes associés aux conflits interjuridictionnels sont décrites. Différentes options quant au rôle pouvant être joué par le gouvernement fédéral lors de la mise en application de cette loi sont aussi identifiées.

Les autres sujets de controverses discutés dans ce texte sont les eaux du Nord qui sont, selon la constitution, de responsabilité fédérale puisque le gouvernement fédéral est le propriétaire des ressources naturelles du Yukon et des Territoires du Nord-Ouest, les droits des indiens sur les eaux à l'intérieur des réserves, et les relations Canada-Etats-Unis en ce qui a trait aux eaux frontalières.

Ce texte est destiné au néophyte en matière légale. Pour ceux et celles qui voudraient un exposé plus détaillé et plus technique sur ces différents sujets, le rapport contient sept (7) annexes qui sont les documents préparés par différents experts en vue de l'atelier. Leurs noms et les sujets qu'ils ont abordés apparaissent dans la table des matières.

Bien que cet atelier ait été préparé à la demande de l'Enquête, les opinions présentées ici sont uniquement celles des différents auteurs et ne représentent pas nécessairement les opinions des membres de l'Enquête.

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I. THE PURPOSE OF THE WORKSHOP

Historically, people in Canada have taken the abundance of water for granted. Yet water is by no means an unlimited resource, as most Canadians have now come to realize. Our demands for 'good' water for domestic, agricultural and industrial use, as well as for providing fish and wildlife habitat, recreational opportunities and pure natural beauty, are already stretching the limits of available water supply in many parts of Canada. Obviously, some rules are needed if these demands are to be met in a fair way.

If one takes all the provinces, the two territories and Canada into account, there is a myriad of laws in Canada which govern when, where, how and how much water we can use, as well as what we can put back into water. Some of these laws are written down, some are not--but collectively, they determine and protect our "rights" to water.

The Inquiry on Federal Water Policy, in its recent publication Water is a Mainstream Issue, states that one of its goals is "to identify and describe emerging water issues in Canada", determining the scope of federal responsibilities in these issues and how they mesh with other jurisdictions. From this, the Inquiry will recommend positions and strategies the federal government can take within its jurisdictional power to help resolve these issues.

To help it meet this goal, the Inquiry asked the Westwater Research Centre of the University of British Columbia to organize a workshop aimed at providing it with a good understanding of water law in Canada. More specifically, the purpose of the workshop was to: 1) develop some sort of consensus as to where water law is clear and where it is ambiguous; where it is adequate and where it is not in dealing with water issues; 2) suggest how water law can be improved to help deal more effectively with problems faced by the country; and 3) identify specific areas of law that need further consideration and research. It was also decided at an early stage to limit the focus of the workshop to dealing with inland or freshwater issues.

Westwater invited people from across Canada who were well versed in the legal aspects of water use and knowledgeable in the issues involving the country's water resources. The workshop sessions were organized around six major topics:

- basic water law in Canada;
- federal/provincial jurisdiction over water;
- interprovincial water management;
- water law in northern Canada;
- Indian rights to water on reserves; and
- international (Canada/U.S.) water law.

Several participants wrote briefing papers on one or more of these topics. These provided background information from which discussion of the major issues could be launched. The format was informal--round-the-table discussion and exchange of ideas. But the mood was often intense as everyone attempted to clarify the fundamental legal components of the issues, and to suggest ways that the federal government, within its legal mandate, could respond to them.

This report summarizes the discussions and findings of this Workshop on Water Law in Canada. It is organized around the same topics discussed in the Workshop sessions. In each chapter, we attempt to provide enough general background so that the reader can understand the major issues related to that topic as well as gain some knowledge of the general content of water law in Canada. The last chapter brings together the recommendations generated in the workshop sessions, and also summarizes the participants' views on what the federal government's role should be with respect to research on water law and management issues. These views are, of course, those of the participants, and are intended to stimulate discussion about water policy issues. They are not the views of the Inquiry Commissioners, who will form their own opinions when their process of study and public consultation is completed. Meanwhile, we hope this report fulfills its objective of stimulating discussion and provides useful and enjoyable reading for members of the Inquiry as well as for all Canadians concerned about our country's water resources.

II. BASIC WATER LAW IN CANADA

The first topics discussed in the workshop were what one might call 'generic' water law issues - problems or disputes that arise from the very nature of the law. The first section of this chapter introduces the main components of Canada's legal system as it pertains to water. The second section then summarizes what the participants pin-pointed as the major issues regarding this basic water law.

A. Canadian Laws and Water

A.1 The 'types' of law

There are two types of laws that determine Canadians' rights to use water: common law (or civil law in Quebec) and statutory law. Common law is the term used to denote the rules established in English-speaking countries based on decisions that have been passed down through history by the courts. As such, many of the components (or rules) of common law remain unwritten, or are recorded in the form of judgments of courts in systems based on English law. Most of Canada - excepting Quebec - inherited the common law system from Great Britain.

Quebec is somewhat different in that much of its law originates from the Napoleonic code of France, which evolved differently from the legal systems of English-speaking countries.

This basic French law is often called civil law to distinquish it from English common law.

In contrast, statutory laws (a statute being an Act) are rules established by the legislatures of countries, states, or provinces; that is, they are not set case by case by a judicial system, but are deliberately formulated and enacted by the elected representatives of the people. The court's role then, with respect to statutory laws, is to interpret them for the purpose of deciding in specific cases exactly what was the intent of the legislature when the particular law was enacted. This need to interpret legislation arises when governments seek to enforce a prohibition or impose a penalty, or where a citizen seeks to force the government to act within the bounds of the legislation. Often the goal of statutory law is to modify or replace common law where the common law is inappropriate or inadequate to serve the purpose of the country or province. We will see examples of statutory modifications of common law dealing with water in the following sections.

A.2 Law-making in Canada

Canada is a federal country, which means that the power to make statutory laws is divided, by the Constitution, between two levels of government - the Parliament of Canada for the country as a whole and the provincial legislatures for the provinces. The provinces may delegate some of their powers to regional and municipal governments to deal with matters at those levels. The northern territories have legislatures that are not as yet fully recognized in a constitutional sense, but they have been delegated certain powers by the Parliament of Cananda.

As for common law, although most of Canada inherited the British system, the common law is not consistent from province to province. Each provincial legislature has made somewhat different statutory modifications of the common law to fit the needs of that province. Each province also has its own judicial system, each of which may interpret the common law somewhat differently - again, being influenced by the needs of the particular province. However, because the Supreme Court of Canada is established as the final appeal court for all the provinces, its decisions tend to bring some uniformity among the provincial courts in matters of common law and statutory interpretation.

A.3 Common law - riparian rights

Under common law, no one can own flowing water outright, but landowners who have water flowing over or percolating through their land hold certain special rights regarding the use of that water. The rights of owners of land to water flowing over their lands are called riparian rights and belong only to those who own the banks of rivers, lakes or other bodies of water. They include the right of access to that water, to receive water in its natural state (subject to limited uses by upper riparians), to fish and to be able to sue anyone who interferes with their rights to water. Owners whose land contains underground water supplies are not riparian owners but at common law they had the right to use whatever quantities of water they could capture from the ground.

The concept of riparian rights - special rights to water that are attached to land ownership - is also a part of French civil law. A fundamental difference lies in how each system of law defines the ownership of the banks and beds of a river or lake. Under the common law, a landowner owns the banks and beds of bodies of water found on his land unless the deed conveying the land to his ownership states otherwise. If a body of water borders two or more properties, the common law rule applies whereby each landowner owns the banks and bed to the middle of the lake or stream.

Under civil law, however, ownership of beds and banks is established by navigability. If a water body is deemed navigable, riparian ownership stops at the high water mark, and the bank and the bed is vested in the Crown (i.e. owned by the state and managed by the government). If the water body is non-navigable, the land owner has rights similar to the riparian rights of the common law.

A.4 Statutory law

As one might suspect, the common law has been drastically modified by statutory law in Canada, particularly in terms of deciding who has rights to use water. For instance, in most provinces the beds of water bodies no longer belong to riparian landowners, but have been vested by statute in the provincial Crown. Legislation in most provinces now requires riparian owners to obtain a permit to store water or to take it in large quantities from a watercourse and requires landowners to obtain a permit before tapping underground water supplies. A permit will usually specify the maximum amount and rate at which the permit holder can take water from the particular source. Furthermore, people who do not own riparian land can also obtain permits to use water, to irrigate land at some distance from a river, for example. (Appendix A elaborates on the statutory modifications of riparian rights in the case of British Columbia; most provinces have similar modifications).

When dealing with water, statutory law has tended to develop along three major lines: laws dealing with water quantity (or allocation), laws dealing with water quality (waste discharge or pollution), and laws that cover indirect uses of water such as fishing and navigation. For example, B.C. has entirely separate systems for regulating water use (quantity) and waste discharge (quality), each operating under its own legislation and administration with limited coordination between the government agencies involved. This trend to separate the regulation of water quantity from water quality seems to be common across Canada.[1]

B. Issues in Basic Water Law

The major issues associated with basic water law in Canada revolve around three general topics:

1. the extent to which common law riparian rights still exist.

2. the allocation of water among competing users.

3. regulating water use to maintain high levels of water quality.

B.1 Riparian rights

Do statutory laws totally replace riparian rights?

The extent to which a piece of legislation modifies or replaces common law riparian rights is not always clear, even to law experts. This confusion causes problems when a riparian owner wishes to sue another water user for injury to his water supply, especially where the other water user has a permit to use the water in the manner that causes injury. The question before the court then is: does the permit override riparian rights, and therefore provide a defense against a claim to damages based on injury to riparian rights? In most cases, the legislation providing for the permit does not say. As a result, in the western provinces for instance, a conflict of opinion exists within the legal profession as to whether the intention of legislators was to indeed abolish riparian rights altogether.

Lawyers have gone on to ask: should water use permits completely replace riparian rights? In our high-technology, high-demand society, water use permits are a more efficient means of allocating water than the riparian system. Many lawyers believe, however, that in the interests of water quality, the riparian owner's right to sue for injury where an upstream user might be discharging harmful contaminants is still a powerful means of preserving high quality conditions. They argue for retaining at least these aspects of riparian rights in water law.

What are riparian owners entitled to?

Just how much water is a riparian entitled to, and how much waste can be discharged into a water system by a riparian, before there is "legal" impairment of the use of that water by other riparian owners? Two schools of thought have developed around this question. One - called the "natural flow theory" - claims that domestic use of water, for household purposes and perhaps for watering a garden, is the limit of acceptable riparian use. The second doctrine, known as the "reasonable use theory", has been developed extensively in the United States. Under this theory, the courts can decide, according to precedents set in past cases, if additional uses beyond merely domestic use, for irrigation or industrial waste disposal for example, are in the best interests of society. If so, they are "reasonable" uses and are acceptable under riparian law. In Canada, wherever riparian rights do still prevail, the courts have leaned towards the natural flow theory, but have kept an interested eye on developments in the U.S. regarding definitions of "reasonable" riparian use.

B.2 Water allocation

The fundamental legal questions asked about water allocation are, given that it is necessary to regulate water use, how should governments decide how much each user is entitled to? Should certain water uses take precedence over others? If so, how should the order of priority be determined?

Problem 1: how much?

As mentioned earlier, most provincial legislatures have adopted licensing or permitting systems to regulate water consumption. Historically, licences or permits were allocated on a first-come-first-served basis, and often for indefinite periods of time. Now, as populations have grown and demands on water resources increased, it may be necessary for governments to be more selective in allocating this precious resource. But, due to historical precedent, many governments are in a bind. For instance, the early statutes did not provide for periodic re-assessment of water-use licences to see if these uses are still providing socially beneficial services, for judging whether the amounts allocated are inadequate or too generous, and for assessing whether the water so allocated is being used efficiently. Likewise, there are often no legal mechanisms for transferring the rights allotted under a given licence to another use that now may be of greater benefit. Finally, there are usually no legal mechanisms for re-negotiating the terms of permits or licences, no matter how inappropriate those terms may have become. In many cases, the only opportunity for changing licences or their uses is if one can prove that the use has been abandoned for a long time.[2]

In effect, then, the major problem in many statutory systems for allocating water is their lack of flexibility to re-assess and change licensed water uses so that the changing needs of society can be met.

Problem 2: Priorities

Early legislation also did not anticipate limitations in our water supply and, hence, did not foresee the need to be able to set priorities among water users. In response to this perceived need, many provincial governments are attempting to establish some order of precedence in their policies, and to then follow these policies when allocating new water licences. But in terms of applying a priority system to old licences, they are usually severely limited by the inflexibility of the old system. In addition, politicians are often reluctant to overhaul the old systems or to try to incorporate priorities into legislation, due to the protests that this would draw from established water users as well as to the uncertainties inherent in choosing priorities in a rapidly changing world.

A way out: a marketing approach?

Some water management experts claim that, in addition to being inflexible, many legislated water allocation systems are too bureaucratic, and too dependent on the discretion of government officials in deciding how water gets used. Many of these critics argue for a stronger marketing orientation, whereby water use would be determined largely by how much users are willing to pay. They maintain that this would increase users' appreciation of the "true value" of water, as users would have to compete for rights to its use, and this would, in turn, reduce wasteful consumption of water. It would also allow bartering among water rights holders. The proponents of a marketing scheme rely on the assumption, based in economic theory, that the open market accurately reflects the wishes of society; hence, "marketing" water rights would be the best means of attaining the most beneficial use of water according to society's priorities.

Opponents to a marketing strategy disclaim this assumption, maintaining that many important users would be unable to financially compete in an open market system, especially against large corporate interests, and that these uses would then be neglected. Moreover, they maintain that many valuable water uses - such as for conservation or aesthetic purposes - cannot be quantified in dollars and would be ignored in a totally market-based system. Under this argument, some government intervention is necessary - so long as it reflects the needs of the community it serves.

B.3 The "ideal" water allocation system

In discussing the issues and problems associated with allocating water use in Canada, the workshop participants proposed elements for what might be called an "ideal" legislated water licensing system. Such a system should incorporate:

a) flexibility - in being able to respond to changing water needs;

b) incentives to conserve - including provisions that compel efficient water use;

c) the notion that water is a valuable resource - not a free commodity, and subject to demands and limitations similar to those of any other renewable or nonrenewable resource (e.g. forests and minerals).

To be able to fulfill these characteristics, the "ideal" system should have the following features:

a) where water rights have already been established, it should provide for the transferability and divisibility of these rights. By this we mean that if a licensed water use becomes redundant, or the amount allocated becomes too generous or too stringent, that the licensee can change the water use to another more feasible use, acquire additional water quantities where available, or transfer the water rights among several users.

b) water licences should be allocated for certain time periods rather than be indefinite; this would automatically make the water use associated with that licence open for re-assessment.

c) alternatively, it may be desirable to incorporate a process for periodic re-assessmesnt by an independent tribunal or board, to judge whether the terms and conditions of water use licences still meet criteria and priorities of the community in which it operates.

d) where water allocation is still in its initial stages - such as in Canada's north, where much of the available water is still 'up for grabs' - minimal flow requirements should be first established for streams, rivers and lakes. This could ensure that adequate water flow would always be available for such things as maintaining subsistence harvesting of fish and wildlife. The 'surplus' - that amount of water over and above the minimal flow requirements - could then be allocated for consumptive uses, perhaps on a first-come-first-serve basis, but subject to provisions for transferability and re-assessment.

e) finally, the system would allow users and holders of water rights to negotiate among themselves, whether for compensation to be paid for impairing water quality or for bartering water amounts among themselves. This would introduce some element of the open market system, but the results would be subject to government approval, so that the governments could ensure that "externalities" or undesirable effects on the community at large do not occur.

A system that incorporated these characteristics would avoid many of the problems experienced in today's water licensing systems; in effect, they represent what water managers have learned in terms of where legislated systems have gone wrong.

B.4 Water quality

Problem 1: Coordinating water quality and water allocation

Legislation that deals with water quality problems has, in most areas of Canada, developed separately from legislation dealing with licensing water use. In many provinces, water quality and water allocation are administered by separate and often independent agencies of government. This, in itself, poses a problem to water managers, especially where allocation priorities should reflect water quality considerations, or water uses should not be licensed without considering the impact on water quality. It also poses problems to water users who may have to contend with dual, and perhaps even conflicting, regulatory systems - one to allocate the amount of water and how it can be used, the other to lay down further terms and conditions on how water can be used and what wastes can be returned to the water environment. Making sure these regulatory systems at least correspond if not complement each other is an important issue in water law administration.

Problem 2: Setting standards

A second important issue related to water quality involves asking two questions: what are adequate or desirable water quality standards? and - how do we know that these standards are being met? The first question is one that governments all over the world have wrestled with, resulting in innumerable lists quoting maximum allowable (or desirable) concentrations of hundreds of chemicals and trace metals. Most of these standards' lists are put forth as government-endorsed guidelines rather than legal requirements, because guidelines are more easily altered in response to our ever-changing knowledge and opinions regarding such standards. Besides, to make such standards law would in most cases create serious enforcement problems.

In terms of the second question, difficulties arise in balancing what is desirable with what can be easily attained. Ambient water quality - the "purity" of water as it occurs and is used - is what most legislation is concerned with, but measuring and monitoring ambient water quality in site-specific situations is a formidable task. Instead, most regulatory systems are designed to 'second guess' ambient water quality, in that they are aimed at measuring and controlling the amounts and quality of waste that are discharged into the water environment. Basically, the system assumes that by controlling the amount of wastes at the point of discharge you can assure proper water quality in the overall water environment.[3]

This emphasis in Canada's regulatory system on controlling discharge quality as opposed to ambient water quality has led some water managers to question whether we are dispensing our regulatory energies and funding in the appropriate direction. Part of the answer lies in the fact that it is basically much simpler to control discharges than ambient quality levels. Perhaps the major focus of attention should be to figure out how to improve the interaction between what is desirable - high ambient water quality - and what we can most effectively work with - discharge quality. How can we best determine dangerous concentrations of waste components? What happens when these components are discharged in combination rather than singly? Are there chemical or physical reactions that occur when these compounds reach fresh or salt water in the environment that increases their toxicity? What characteristics are important to know about a receiving water environment to judge its capacity to absorb wastes? Focussing on such questions could help bridge the gap between legislative concerns over ambient water quality and the current discharge-oriented regulatory systems.

Problem 3: penalties vs. negotiation

Enforcing water quality standards and regulations is as much a political process as it is a legal process. Laying charges for breach of standards or conditions set in permits is not dependent solely on technical considerations. It is colored by such things as the discharger's ability to pay for decreasing pollution levels, the economic and political desirability of the project or industry, the degree of public support (or opposition) for the discharge, and general perceptions as to the feasibility of the standards.

Many lawyers believe that the criminal law approach is often inappropriate for the implementation of water quality standards. In many parts of Canada, charges may not be laid even when permit terms and conditions are consistently breached. Rather, negotiations occur between government regulators and the offending user. This changes the whole legal 'scene', from that of imposing penalties to that of drawing contracts and enforcing binding agreements. The degree to which this transition could, or should, occur is another issue and source of debate within not only the legal system but in all water management professions.

Footnotes

1. As is pointed out in Appendix A, Yukon and the Northwest Territories are exceptions where water use and water quality are licensed by one administrative board under one statute, the Northern Inland Waters Act.

2. As Professor Percy told the workshop, in Alberta, where large tracts of land were made available to settlers, water rights were granted to irrigation companies, which tended to claim more water than they originally needed (or could possibly use) so as to provide for future expansion. As a consequence, many early Alberta water licences were very generous in the amount of water they allowed to each irrigation company. Once the large water rights were granted, both in Alberta and in American jurisdictions with similar systems, the fear arose that the holders of the oldest rights might use their monopoly to sell excess water to new settlers at a profit. Alberta and neighbouring American states countered this possibility by making a water licence appurtenant to the land on which it would be used, so that a licensee cannot transfer or sell water rights without transferring or selling the land to which they are attached. This pattern of granting extensive water rights and forbidding their transfer has meant that some old licensees hold very large water rights with no incentive to conserve water. These large existing licences may mean that there is not sufficient water available to provide water rights for new users.

   In actual fact, water administrators in Alberta re-negotiated many earlier licences to reduce the amounts of water they allot so as to be able to spread the available water more evenly among the competing users. They are in some cases even transferring licences to other uses, where the benefits of a new allocation obviously outweigh those of an old one. Both actions, however, have no legal basis, and are even at times in violation of the province's statute. But they are necessary to meet the rising demand and changing priorities for an increasingly limited resource.

3. This is indeed the situation when one looks at federal legislation requirements and how they actually are met. Provisions in the federal Fisheries Act aim to protect fish habitat from pollution - essentially, a concern with ambient water quality. However, regulations established under this Act to fulfill this aim are directed almost exclusively at waste discharge, stating how much of a number of dangerous compounds can be emitted into water inhabited by fish.

III. INTERJURISDICTIONAL ISSUES 1: FEDERAL VERSUS PROVINCIAL POWERS

There are many interjurisdictional issues in managing Canada's water resources because water has one confounding characteristic -- it moves, completely oblivious to political boundaries. Water flows between provinces and water bodies straddle their boundaries. In a legal sense, this situation creates two types of issues:

1. Constitutional issues: disputes between the federal and provincial jurisdictions. These issues are concerned with whether, under our Constitution, it is the federal Parliament or the provincial Legislatures, or both, that may make laws on a given subject involving water.

2. Conflict of laws issues: disputes between two or more provinces or territories concerning the applicability of their laws to any situation which has impacts across provincial borders.

This chapter deals with the first type of issues - federal/ provincial issues over jurisdiction over water. Chapter IV will discuss the second category. We should also note that water law issues also occur at international boundaries; these are the subject of Chapter VII.

Professor David Percy of the Faculty of Law at the University of Alberta provided the workshop with a background paper that clearly describes the legal basis for both federal/provincial and interprovincial jurisdictional issues (see Appendix D). This chapter draws on the first nine pages of this paper and the ensuing discussion in the workshop.

A. The Constitutional Basis

As noted in Chapter II, Canada is a federal state and as such the power to legislate (make laws) is divided between the federal Parliament and the provincial Legislatures. The Constitution Act, 1982 specifies those subjects upon which either the federal Parliament or the provincial legislatures may exclusively make laws. Section 91 of the Constitution Act is the primary list of those subjects (termed "heads of power") about which the federal Parliament may legislate; s. 92 states the provincial Legislatures' heads of power. The two lists are intended to cover all possible subjects. More importantly, the two lists are intended to be exclusive so that neither the federal Parliament nor the provincial Legislatures may make laws concerning a matter which does not fall within one of their respective heads of power. When a court finds that a given federal or provincial law concerns a matter that is within a head of power belonging to the other, the court rules that the law is *ultra vires*, which means that the legislature which made the law did not have the power to make it. Once the court declares a law to be *ultra vires* it has no force or effect.

The courts, however, often have difficulty declaring whether any law is ultra vires because the various heads of power in both s. 91 and s. 92 are, by necessity, expressed in very general terms. As a result, the lawyers for the federal and provincial sides of a constitutional dispute may each argue that the disputed law falls within one or more of the broadly worded heads of power given to their side by s. 91 or s. 92.

Jurisdiction over water is divided between federal and provincial powers. Under s. 109 of the Constitution Act water is owned by the provinces and under s. 92(5) the provincial Legislatures may make laws governing the management and sale of water. In addition, three other heads of power in s. 92 allow the provinces to make laws concerning other aspects of water. These are s. 92(10) - "local works and undertakings"; s. 92(13) - "property and civil rights"; and s. 92(16) - "matters of purely local and provincial concern." Furthermore, s. 92 A(1)(c) expressly states that the provinces have management powers with respect to hydro-electric power developments. Collectively, these heads of power give the majority of legislative jurisdiction over water to the provinces.

The federal Parliament, however, is allotted three kinds of power which give it constitutional authority to make laws which either directly or indirectly affect water. These are the federal "residual" power (or "POGG"), the power to make laws concerning coastal and inland fisheries, and the power to make laws concerning navigation and shipping.

This division of law-making power respecting water raises two central questions. First, given that the provinces own and manage water, how and in what circumstances can the federal government make laws affecting water? Second, if the federal laws should conflict with provincial laws, which will prevail in any given situation? Some answers may come from looking at the nature of the three federal heads of power in more detail.

B. Federal Heads of Power

B.1 The residual power - "POGG"

The preamble to s. 91 of the Constitution Act gives the federal Parliament the power "to make laws for the peace, order, and good government of Canada . . . " or "POGG", as lawyers like to call it. This power is termed "residual" as it allows the federal Parliament to legislate on subjects of a national dimension which were not included in either s. 91 or s. 92 heads of power such as radio and aeronautics. The real importance of this power however, is that it may also be used by the federal Parliament to legislate, under special circumstances, on matters which are constitutionally under exclusive provincial power, such as controlling inflation in costs and prices.

There is a lot of uncertainty about just what these special circumstances are. According to the decisions of the Courts in case which have dealt with this question, there are two possible circumstances where provincial powers may be overridden: where the subject of the law in question is of "national concern," and where the subject constitutes a "national emergency." Defining exactly what these expressions legally mean has been hotly debated in the courts; the details of this debate are described in Appendix C. It is sufficient to say here that some lawyers believe that only if the circumstances constitute a "national emergency" -- in that the entire country is affected in some immediately damaging way -- will the courts allow the federal Parliament to exercise its residual power in a way that substantially affects provincial powers. Other lawyers contend that in matters of "national concern" -- that is, the effects are not necessarily nation-wide or of 'crisis' proportions -- the federal Parliament can still act under its POGG power. Some recent cases suggest that the courts are leaning towards the latter interpretation.

B.2 Fisheries

Using its s. 91(12) power, the federal Parliament passed the Fisheries Act, which regulates, among other things, the deposit of contaminants in water. But is that not a provincial concern under a province's water management power? Recent court decisions suggest that the Fisheries Act is valid federal law only to the extent that its regulation of water quantity or quality is directly linked to the protection of the fishery.[1] Nevertheless, this still provides Parliament a wide scope to enact regulations affecting water resources.

B.3 Navigation

Using its s. 91(10) power, the federal parliament passed the Navigable Waters Protection Act. The Act is little used, but potentially could be an important federal instrument in the area of water management, depending on how broadly or narrowly the courts interpret this head of power. For example, s. 6 of the Act allows the federal Minister to order the removal or destruction of any work (bridge, boom, dam, etc.) that, without federal approval, interferes with navigation.[2][3]

In summary, the provincial Legislatures have the constitutional powers to make laws concerning the ownership and management of water. The federal Parliament, under "POGG", may make laws that directly interfere with provincial jurisdiction as well as indirectly affect provincial water management through its powers over fisheries and navigation. The results is that now, approval from both levels of government is often needed for activities that affect water. For example, if a dam is to be built, provincial approval is necessary because of provincial ownership and management of water while federal approval is also necessary if the dam would affect the fishery or navigation.

C. Federal Involvement in Interprovincial Disputes

Whatever authority is encompassed under "POGG" is still, as Professor Percy notes, "notoriously controversial." This is particularly true in considering whether the federal government should intercede, in the interests of peace, order and good government, in interprovincial disputes. For instance, acid rain might be agreed to be a "national emergency" needing federal action, since its effects are so pervasive. But can a dispute between B.C. and Alberta over building a dam on the Peace River, or a disagreement between Quebec and Newfoundland over the use of Churchill Falls to generate electricity be considered a "national emergency"? Are they even of "national concern" such that the federal government should step in even in some limited way? So far, there are no legal authorities that can give a definite answer. The issues and dilemmas that both provincial and federal governments may find themselves in as a result of this ambiguity are at the forefront of water law issues in Canada today -- and are the subject of the next chapter.

Footnotes - III

1. For example, it has been decided that s. 33(3) of the Act is outside the federal Parliament's jurisdiction (ultra vires), and therefore has no force or effect, because its prohibition on the deposit of slash, stumps, or debris in water frequented by fish is too wide and not directly linked to the protection of the fishery." (Fowler v. The Queen (1980) 113 D.L.R. (3d)).

2. In a recent case, the B.C. Appeal Court took a strict view that for a federal law to be valid under s. 91(10) of the Constitution Act, it must be directly linked to interference with navigation: R. v. Crown Zellerbach Canada Ltd., 13 Can. Environmental Law Reports 29 (BCCA).

3. The ability of the federal minister to order the removal or destruction of hydro-electrical works such as dams under s.6 of the Navigable Waters Protection Act may have been removed by s. 92 A(1)(c) of the 1982 resource ammendment. The section gives the provinces exclusive powers for the development, management, and conservation of hydro-electrical works. It may be, however, that the courts will not allow s. 92 A(1)(c) to take away any federal powers with respect to fisheries or navigation.

IV. INTERJURISDICTIONAL ISSUES 2:
INTERPROVINCIAL WATER LAW

This category of issues concerns legal disputes between the governments, private citizens or interest groups of two or more provinces or territories. The disputes usually arise when one province authorizes activities respecting waters within its own boundaries which adversely affect citizens in a neighbouring province. For example, the authorization of waste disposal or the construction of a dam in one province may result in the pollution of water or the flooding of land in a neighbouring province. The resolution of such problems is of crucial importance today, as more and more major water developments are planned that may adversely affect neighbouring provinces or territories.

A. Interprovincial Water Law

The field of interprovincial water law is as yet 'up for grabs' in Canada. The courts have not been faced with many cases to date that have forced them to determine what the law should be regarding the sharing of water by the provinces or the settlement of interprovincial disputes. As Professor Percy notes in his background paper, until recently, provincial water managers seemed to assume that as long as they did not infringe on federal jurisdiction over navigation and fishing, they could authorize any polluting, flow reducing or diverting actions "without fear of serious legal repercussions in downstream provinces."

Two issues resulting in important court cases have challenged this assumption. One is described by Professor Percy (Appendix D), the other by Professor L. Giroux of the Law Faculty of the Universite de Laval (see Appendix E). The following highlights the important findings of these cases.

A.1 The Interprovincial Co-operatives Case

This issue arose in a 1976 case when Ontario and Saskatchewan allowed chlor-alkali plants to discharge waste that contained mercury into rivers. The rivers, however, also flowed into Manitoba, and the pollution resulted in the closure of Manitoba's commercial fisheries. Manitoba's provincial government paid financial assistance to the fishermen and tried to sue the two industries responsible for the discharge in the other two provinces.

To understand the Supreme Court of Canada decision that resulted from this attempt, it should be noted that under s. 92(13) of the Constitution Act, 1982 "property and civil rights" are a provincial head of power. The majority of the Court dismissed Manitoba's suit on the grounds that to allow it to succeed would have the effect of allowing Manitoba to make laws affecting the civil right to pollute in other provinces.

However, some judges in that case argued that Ontario and Saskatchewan were interfering with the right of Manitobans to obtain clean water. This argument implies that contrary to legal convention, it is the laws of the province that is receiving the harm, rather than the laws of the province in which the harmful action originates, that should apply in the courts. While this view has not been adopted in Canada's courts in its entirety, it is gaining wide acceptance in the legal profession.

A.2 Dispute over Churchill Falls

In 1961, the Newfoundland Legislature leased waters in Labrador to a company which later came under the control of Hydro-Quebec. Under the lease, the rights of ownership and management had passed to the company and then to Hydro-Quebec. Under a contract with the original company, Hydro-Quebec was also guaranteed a certain amount of power at an agreed price. In 1980, however, the Newfoundland Legislature passed the Upper Churchill Water Right Reversion Act, the purpose of which was to revert the ownership and management of these waters back to Newfoundland. Newfoundland claimed it could do this under its head of power of "protecting property and civil rights."

The Supreme Court of Canada ruled, however, that the Act actually interfered with Hydro-Quebec's right to receive power under a contract made outside Newfoundland. The Court declared the Act ultra vires on the ground that its true purpose was to interfere with rights outside the province.

Both of these cases indicate that the Supreme Court of Canada is loath to treat interprovincial disputes on the basis that each province has independent sovereignty over its own waters and can do what it likes; Manitoba's situation did receive legal 'sympathy', and Newfoundland could not step out of a contract simply because it originally owned the water rights. The cases also suggest the possibility that Canadian courts in future may develop 'common law' rules that define the rights and obligations of provinces and their citizens to their water-sharing neighbours.

B. Characteristics of an 'Ideal' Law

In the face of the highly uncertain nature of laws pertaining to interjurisdictional waters in Canada, and because it is impossible to accurately predict how courts might resolve major disputes over these waters, Professor Percy notes that there is a strong incentive for provinces to negotiate cooperative arrangements in sharing interjurisdictional waters. But negotiations are not always successful, especially if one party has potentially far more to lose than the other -- as is often the case with water. Also, without some imposed incentive, negotiations can often take extremely long to reach a settlement; meanwhile, the waters under dispute could be 'frittered away'.

Some sort of interjurisdictional water law is needed to deal with conflicts like the ones described by Professors Percy and Giroux. In considering the nature of this law, the workshop participants suggested that it should have the following characteristics:

1. it should be able to resolve conflicts among two or more jurisdictions, federal or provincial;
2. it should be compulsory and enforceable;
3. it should respect, as much as possible, provincial authority in water law and thereby avoid federal-provincial conflict;
4. it should enable developments to proceed in appropriate cases on the basis of a settlement acceptable to both sides.

B.1 The role of the federal government

While workshop participants appeared to agree on what an interjurisdictional water law should be able to do, there was less agreement on how it should be enacted and who should be involved. At dispute was the question: should the federal government have a role in resolving interprovincial disputes? Those in favour of federal involvement argued that these disputes are of national concern and that Parliament has a right and duty to intervene under its "peace, order and good government" power. They also felt that the resolution of such conflicts by either interprovincial negotiation or court litigation is a very slow process, and that the settlement of water quality issues needs faster action. Opponents to federal involvement, on the other hand, argued that interprovincial disputes are not national issues, and that the provinces have the right to sort out their conflicts without federal intervention.

Obviously, resolving these arguments and clarifying everyone's role in interprovincial water conflicts is highly desirable. But in weighing its options, the federal Parliament must consider not only legal questions -- does it have the power to intervene under "POGG" or not? -- but also political ones -- which role can it take to make an effective contribution and still retain the support of the provincial legislatures in its actions? There are a range of such policy options:

- no federal involvement: conflicts would be resolved in court.
- support only: provide research assistance and some financing in aid of interprovincial agreements.
- provide incentives: apply political, financial and legal pressure to resolve conflicts through action it could take under the Fisheries Act, Navigable Waters Protection Act, etc.
- impose settlements: encourage interprovincial negotiation but as a last resort, step in to impose a settlement.
- direct assumption: step in as soon as a conflict arises and take over the regulation of interjurisdictional waters.

B.2 Legal options for the federal government

The political factors involved in choosing among these policy options are obviously great. But since this was a workshop dealing with legal issues, the participants arrived at several legal alternatives to dealing with interjurisdictional water conflicts -- some of which suggest which policy route the federal government could take.

1. The status quo: Maintaining the present situation -- complete uncertainty -- generates stand-offs but does induce the negotiation of agreeements by the provinces. However, the problems of slowness and potential disparity in negotiating power have already been pointed out.

2. An interprovincial common law: The federal and provincial governments may simply rely on the development of judicial decisions that define the rights and obligations of provinces and their citizens with respect to resources such as water that have cross-boundary characteristics. While this alternative again allows the federal government to remain uninvolved, the process of developing such a common law would likely be slow and fraught with uncertainty along the way. Current and potential water-use conflicts may well need faster, more certain means of resolution.

3. Unilateral federal intervention: At the opposite end of the legal spectrum, the federal Parliament could test its POGG powers by intervening and imposing a decision unilaterally in a conflict situation. Such action would very likely be challenged in court by the provinces affected, in which case the Supreme Court of Canada would be forced to clarify whether interjurisdictional disputes respecting water are "national emergencies" or merely "national concerns" and just what is the federal mandate in interjurisdictional waters. The benefit of this alternative is gaining such clarity of roles, but the potential costs in terms of loss of political and legal power may be too great for the federal government to hazard taking this course of action.

4. "Safety net" legislation: Parliament could pass "safety net" legislation designed to provide financial incentives to provinces for entering into agreements regarding interjurisdictional waters, but also allowing federal intervention when provinces can not agree. This approach is again dependent on Parliament's powers under "POGG" and as such, the legislation could be challenged by the provinces both in the courts and in political arenas.

5. A process-oriented statute: The final alternative suggested at the workshop was revising the present Canada Water Act or developing a new statute (a Canada Interprovincial Agreements Act, for example) that would simply set out a code of procedures to be followed in the event of an interprovincial dispute over water. As part of these procedures, the Act could provide for mediation procedures, to be followed by arbitration, if necessary, by the Federal Courts, or by a new 'court' made up of judges from the jurisdictions involved. The statute would apply equally to all levels of jurisdiction; and would require that the terms of agreements made under the set of procedures be absolutely binding on the parties involved.

While this alternative still holds uncertainties in terms of timeliness and effectiveness, it was favoured by many participants at the workshop as the one most reasonably and effectively to fulfill the objectives of a Canadian interjurisdictional water law.

V. NORTHERN WATER ISSUES

A. The General Situation

Compared to southern Canada, northerners are in a rather unique and enviable position, in that they can learn from the water management experience of the South while starting with a relatively clean slate in terms of the pristine quality and unallocated status of most of the northern water resources.

This is not to say that the North is in a comfortable situation. There are potential 'pressure points' in both large and small-scale water resource use. For example, there is active interest in developing the Slave River and other tributaries of the Mackenzie River for hydroelectric power. In addition, various schemes to divert major portions of the Mackenzie River system to the water-short southern provinces and the U.S. have been suggested. On a smaller scale, localized water quality problems exist where communities discharge domestic wastes into river systems. Also, increasing industrial development means greater and greater impacts on the natural water quality. These effects are intensified by the nature of the northern environment. The colder temperatures and naturally acidic water conditions in much of the northern land mass mean that biological and chemical processes that help degrade domestic and industrial wastes operate much more slowly. This means that the overall capacity of the water environment to absorb wastes is lower in the North than in southern Canada -- a characteristic that must be taken into account in planning any type of activity that directly or indirectly affects northern waters.

A.1 Jurisdiction over northern waters

Unlike the situation in the provinces where the provincial governments own and manage water, all waters in Yukon and the Northwest Territories are presently owned by the federal Crown (subject to unsettled aboriginal land claims). This vast area of Canada has only territorial status, with most natural resources falling under the jurisdiction of the federal government. The federal Department of Indian Affairs and Northern Development (DIAND) is responsible for administering or coordinating all federal management and regulatory activities; in essence, it acts as 'landlord of the North'. Both Yukon and the Northwest Territories have territorial governments, to which the federal Parliament has delegated certain administrative powers. But, unlike the provinces which were established by the Canadian Constitution, the territorial governments were created by statutes of Parliament and remain subject to all federal legislation.

A.2 Management of northern waters

Again, unlike the split system typical in the provinces, the system of water management in northern Canada is somewhat unique in that both water quality and water allocation are treated under one federal statute, the Northern Inland Water Act. In addition, the

Act is administered in each territory by a single body called the Water Board, whose primary responsibility is to review applications and issue licences (with final approval by the Minister of DIAND) for water use and/or waste discharge.

Although by no means 'ideal' in itself, the system of water licensing in the north does incorporate a number of the characteristics of the 'ideal' water allocation system described in Chapter II:

- the system integrates water quality and water quantity factors, in that terms and conditions for both aspects are included in a single licence;
- licence applications are subject to public review at hearings held by the Boards;
- licences are issued for a fixed term, and can be from 5 to 20 or 30 years;
- upon renewal, licences are reviewed and revised if necessary;
- a Board can issue a short-term, interim licence where uncertain conditions warrant it;
- a licence can be cancelled where the licensee does not comply with the terms and conditions or fails to use the water for three years;
- licences are transferrable only on Water Board approval; and,
- a Board's decision can be appealed to a federal court.

B. The Issues

While the water management system under the Northern Inland Waters Act appears to avoid some of the shortcomings of provincial systems, problems still occur. Many of these problems are described in the paper presented by Letha MacLachlan, Legal Counsel to the

Dene Nation in the Northwest Territories (see Appendix F). The following highlights the major points of this paper and the discussion it provoked.

B.1 Priorities and standards:

The Northern Inland Waters Act authorizes the making of regulations that set water use priorities and water quality standards. As yet, no such regulations have been made, yet many critics claim that according to the Act, the terms and conditions which the Boards specify in licences are supposed to be based on these priorities and standards. They believe that such regulations are necessary if northerners are to plan the use of their water resources rationally. The Boards have published guidelines that state standards for municipal waste discharge, but Ms. MacLachlan points out that if the Boards wish to enforce them in a legal sense, standards must be set in Regulations and not presented only as guidelines which may or may not be incorporated into the terms and conditions of licences. Others argue that a "guidelines" approach is necessary to provide the flexibility needed to deal with the different natural conditions that prevail at different discharge locations.

B.2 Unlicensed water use:

According to current Regulations made under the Northern Inland Waters Act, only 'major' uses of water require a licence.[1] This, in effect, exempts a very significant number of water uses -- which may represent a substantial proportion of the total amount of water being used in the North. Formerly, many of these minor uses were reviewed and "authorized" by a DIAND official -- but this process was recently stopped by an amendment to the Regulations.[2]

This situation means that the Water Boards may be left unaware of many of the uses to which northern waters are being put, which may be seriously undermining their ability to license water resources in a comprehensive manner.[3] Moreover, while the overall impact of the use of relatively small amounts of water is difficult to judge, possible deterioration of the resource by 'insignificant increments' provides an argument for finding some legal and accountable process for regulating these uses.

B.3 Federal jurisdiction - confusion and conflicts

As administrator of most of the land and resources in the North, DIAND has the lead role in encouraging northern resource development. At the same time, however, it is also responsible for protecting the interests of northern native people and protecting the northern environment. Many critics have contended that this multi-purpose mandate constitutes a conflict of interest, and that DIAND is too often left to police its own activities.

With respect to water, there is an underlying debate over just who is responsible for planning the management of northern water resources -- the Water Boards or DIAND. DIAND views the Boards as serving only a regulatory function through their licensing responsibilities. But the Boards claim a broader role, based on their mandate as stated in the Northern Inland Waters Act: "to provide for the conservation, development and utilization of the water resources . . . ". Furthermore, the Boards seem to have greater support from Northerners. Since they are based in the territories (and not Ottawa) and include northern residents in their memberships, the Boards might be considered to be more accountable to northern interests. They may also be more sympathetic to northern aspirations of gaining greater control over managing northern affairs and resources than federal government agencies.

C. A 'Revised' Northern Water System?

In light of the present problems and aspirations in the North, what might be desirable characteristics to incorporate into a 'revised' northern water legislation and management system? The workshop came up with a few suggastions.

1. All parties involved -- the federal and territorial governments and the northern aboriginal peoples -- should clarify the meaning of aboriginal rights to water, and these rights should be incorporated into the priorities established in water planning and licensing procedures.

2. The use of an independent regulatory tribunal is still attractive in the North. However, its powers should be more complete in having greater control over all water uses, both large and small. This need not imply that the Boards must review and decide every water use application, as this would be onerous and time consuming. Rather, restoring the "authorization" process, but making the authorizing official directly responsible to the Water Board instead of DIAND, would help to achieve a more comprehensive and publicly accountable system.

3. Water licensing should be carried out in conjunction with a more planned approach to water use. There is currently a strong push for land use planning in the North. The momentum from this should be carried over to include water use planning. Similarly, land use permitting (now administered by DIAND) should be better coordinated with water licensing. One suggestion was to have one independent Board responsible for both land use permitting and water use licensing activities.

4. While it may be desirable to have water use classifications, priorities and water quality standards established by regulations, they should conform to goals formed through a water and land use planning process on a territorial, regional or local scale.

5. To gain a stronger northern identity and purpose, the Water Boards should be accountable to the appropriate Ministers of the territorial governments, as well as to the Minister of DIAND. Ms. MacLachlan expressed the opinion that accountability in certain functions should also be extended to the major aboriginal organizations.

6. Government personnel should be taken off the Boards. Government employees should be involved only as technical advisors and in enforcement of the Board's decisions.

7. There is much confusion over how far territorial boundaries extend into Arctic waters, particularly in the straits between the mainland and the Arctic Islands and among the Islands themselves.

Canada claims these straits as internal waters, and therefore they can be considered to be: (1) within territorial boundaries and subject to territorial administration, or (2) part of Canada but outside territorial boundaries, hence, under federal jurisdiction only. Northerners align with the first alternative, but there are indications that the federal government sides with the second. This question will become crucial as the territories strive to become provinces. Dealing with it now could waylay a major conflict in the future.

Footnotes V

1. The classes of uses that do not require licences are noted in Ms. MacLachlan's paper.

2. The circumstances that brought about the end of the authorization process is described in Ms. MacLachlin's paper. (Appendix F).

3. The Water Boards are attempting to keep control over all water use projects by persuading developers to make applications in all cases, even the exempted ones, so that the Board will have complete records of water use. Also, since nearly all water use projects will involve some waste disposal into the water environment, the Board believes that it can regulate water use projects which will have significant impacts by requiring a licence for waste disposal. Whether such a licence can be legally required where the water use falls into an exempt category is arguable even if there will be accompanying waste discharge.

VI. INDIAN RIGHTS TO WATER ON RESERVE LANDS

This topic was the subject of a paper presented to the workshop by Philip Ketchum, Q.C., (see Appendix G). Neither Mr. Ketchum nor the Workshop dealt with aboriginal rights of native peoples in the broad sense, but only with the rights to use water that are attached to Indian reserve lands.

Mr. Ketchum explained why Indian reserve water rights are so important, particularly in the prairie provinces of Canada. He noted that in the agricultural economy of this region, water is even more important than oil. Indian reserves have been established on almost all the major water systems of the prairies. For example, about 80% of the water supplied for irrigation districts in Alberta comes from rivers that are potentially affected by the water rights attached to Indian reserves.

A. Control over Water on Reserves

Section 91(24) of the Constitution Act gives the Parliament of Canada the exclusive power to enact laws dealing with "Indians and lands reserved for the Indians." The courts have interpreted this power as creating federally-controlled enclaves within a province in the sense that the province cannot make laws that would affect the use of the reserve lands or affect the Indian's rights with respect to these lands.

Therefore, should one contemplate building a dam in a river or lake, for example, it is important to know whether the bed of the river or lake is part of an Indian reserve. If it is, the province cannot authorize or regulate the dam. Only the Parliament of Canada can do so, and anyone contemplating such a project must act in conformity with Parliament's special rules for dealing with reserve lands (for instance, Indian consent must be obtained).

B. The Issues

B.1 Are river beds part of reserves?

Even if a body of water is located on a reserve, there is some dispute over whether the bed of that water body is actually part of the reserve. To determine this, the history of establishing the reserve must be carefully examined. In Saskatchewan and Alberta, the reserve was likely set aside before the provinces were created in 1905. Prior to 1905, the law which applied was the law of the Northwest Territories, which, as of 1870, adhered to the common law and statute law of England. English common law at that time said that if a parcel of land bordered a river or lake, the owner of the parcel was presumed also to own the bed of the river or lake to a half-way point (the ad medium filum rule). If the parcel entirely surrounded a lake or was on both sides of a river or stream, the owner was presumed to own all of the bed within the boundaries of the parcel. If these common law rules were applied to Indian reserve lands then, to the extent that reserve lands border on rivers or lakes, or included rivers or lakes within their boundaries, the

Indians will also own the beds. Therefore, they can effectively control any structures or other uses of water that depend on ownership of the bed or banks of a river or lake.

However, some lawyers claim that these common law rules may not apply to Indian reserve lands. Mr. Ketchum argues in his paper that these common law rules were never applied in Canada to navigable rivers, which would include all major prairie rivers and streams. Furthermore they were inconsistent with the systems of surveying lands and registering title which were introduced into the Northwest Territories by legislation of the Parliament of Canada enacted before the Indian reserves were established. Other lawyers at the workshop disagreed with some of Mr. Ketchum's arguments, so that the question whether Indians own the beds of rivers and lakes which cross or border reserve lands is still what lawyers call a "moot" point -- that is, it is an arguable point until sometime in the future when the courts are actually faced with deciding the issue and make a binding decision one way or the other.

B.2 Do Indians still have riparian rights?

Even if the Indians do not own the beds of rivers and lakes that cross or border reserve lands, the Indians may still have substantial water rights merely by virtue of being riparian proprietors -- that is, their reserve lands include ownership of the banks of rivers or lakes, if not the beds. As discussed in chapter II, these riparian rights include the rights to receive the benefit of water undiminished in quantity and quality. Under these rights the Indians could take legal action to prevent upstream pollution or to prohibit the building of dams which would diminish water flows in the Reserve.

However, it is not entirely clear if Indian reserve lands include such riparian rights. These rights, if they exist, would not be diminished by the provincial statutes which modify or abolish riparian rights because, as previously stated, provincial laws cannot apply to Indian reserve lands. But other federal laws could apply. In 1894 the Parliament of Canada passed the North-west Irrigation Act (S.C. 1894, c. 30; am. 1895. c. 33, since repealed). This statute said that water rights were deemed to be vested in the Crown and no one could get the right to use water, save for domestic purposes, without a licence. If it applied to Indian reserve lands, it would have the effect of removing most riparian rights and placing Indians in the position of having to apply to the federal government for licences to use waters crossing or bounding reserve lands just like non-natives must apply to provincial governments to gain water rights on their lands. The legal question is whether the North-west Irrigation Act should be interpreted so as to take away riparian water rights from Indian reserves, and particularly those that were already established prior to 1894 when the statute was enacted. Many lawyers argue that, regardless of when a reserve was established, Parliament did not intend that the North-west Irrigation Act should be applied to restrict Indians rights to water.

Obviously there are many unanswered legal questions concerning Indian rights to water on reserve lands. Similar legal questions are now confronting water managers in the United States, but there the courts have gone a considerable distance in recognizing priority rights of Indians to use water flowing through reserve lands. In many ways, the U.S. examples are setting precedents that native people may expect Canada to follow. These issues will be important to all Canadian as the demands for water use increase in all parts of the country.

VII. THE INTERNATIONAL SCENE

No background paper regarding international aspects of water law was prepared for the workshop but two participants gave brief presentations backgrounding these aspects with emphasis and examples from Canada/United States relations. Professor Charles Bourne from the Faculty of Law at the University of British Columbia spoke on the development of international water law and the International Boundary Waters Treaty. Professor Scott Fairley, from the Law Faculty at the University of Windsor, focussed on the concerns and legal issues surrounding the Great Lakes. While there are many more international water issues, our goal was to look at only a few as examples of the legal problems that pervade most international relations regarding our shared water resources.

A. Development of International Water Law

Most international issues regarding water revolve around major rivers that cross international boundaries, or lakes and rivers that form part of these boundaries, such that the waters are shared by both countries. Historically, the main issue with respect to waterways shared by one or more nations was the question of free navigation, but this has been replaced somewhat by concerns over shared use, power generation and water diversions.

At the turn of the century there was no explicit international law with respect to transboundary waters. In North America by 1894, the United States had adopted what came to be known as the Harmon doctrine whereby Mexico, as a downstream country on the Rio Grande, was denied any enforceable right against the United States as an upstream country so far as water diversions or water quality were concerned. This doctrine was simply an extension of what is called "territorial sovereignty," but in the ensuing decades, the Harmon doctrine received much adverse criticism by international commentators because of its denial of any protection to downstream users of a transboundary water body.

A contrasting doctrine could be found in common law in the recognition of riparian rights. If one abided by the "natural flow" theory (discussed in chapter II), under riparian law, virtually nothing can be done by an upstream riparian proprietor that would substantially impair use by a downstream riparian proprietor. In view of many lawyers, this riparian alternative does not provide a sound basis for international relations. Rather, a middle ground must be found between the extremes of the Harmon doctrine on one hand and of riparian rights on the other.

This middle ground might be provided by the doctrine of "apportionment." Its roots lie in the "prior appropriation" rules which evolved for water law in the southern and western parts of the United States. Under these rules, priority is given to whoever is first in time in using water for beneficial use. However, this rule would usually favor the downstream state because, according to Professor Bourne, settlement and development historically commenced in the downstream portions of a watershed and moved gradually upstream. As such, the prior appropriation theory also fails to provide a equitable solution between upstream and downstream proprietors.

In 1907 the Supreme Court of the United States applied an "invented federal common law" to resolve a transboundary water dispute between Kansas and Colorado, adjudicating the quantities of water flow to be apportioned between the upstream and downstream states according to principles of fairness and reasonableness. Priority in time was only one of several factors that were considered.

International law has since developed in the mould of this US precedent and new definition of apportionment. The terms now used in the international law field are "equitable utilization" and more currently "equitable participation". As to how the courts determine what is "equitable" Professor Bourne argued that it is not useful to try to formulate legal rules beyond the general concept of "reasonable use". Each water basin is unique in its social, economic and physical respects, and therefore in each case the question of reasonable use depends on the particular facts. Rather, the approach in international relations is to emphasize a gathering of the facts, their analysis, and discussion leading to a joint decision about what is the best use for all concerned. There is a notion of the "unity of the water basin", but there is also recognition of the hard fact that "the border is there".

As a result, as international law operates now, a nation state cannot act unilaterally with respect to a shared water resource. It has the obligation under international rules to 1) notify the other affected states before taking action; 2) to exchange data concerning the water flows and the intended water use; 3) to consult with the other affected states; and 4) to negotiate towards reaching an equitable settlement of the issues. The rules for dividing the offshore region in the North Sea for the purposes of hydrocarbon exploitation, together with resolution of fishery issues were cited by Professor Bourne as other examples where there is an international obligation to negotiate to reach equitable settlements.

If one seeks for specifics - - for example, how long need a state negotiate? - - Professor Bourne suggested that experience shows that once the process of notification, exchange of data and negotiation gets started, it seems to lead at its own pace to an eventual agreement. Indeed, the great number of water law treaties attest to the success of such negotiations; in 1973 there were 27 such treaties between Canada and the U.S. However, if the question is to what degree can one neighbor country harm another, substantive law is virtually nonexistent. Obviously, some pollutants are so serious that an absolute prohibition can be assumed. As for those who argue that any harm to downstream interests caused by an upstream state is illegal, there is quite a lot of disagreement. Such a rule would lead to the point where an upstream state could not carry on any activity affecting the waterway without getting the consent of the downstream states. The courts contend that principles of "equity" -- historical relations and fair access to water -- are important considerations in addition to the trade-off between benefit and costs.

B. Canada - U.S. Relations

B.1 The International Joint Commission

International law does not require that states sharing a boundary water resource should establish joint commissions for reaching equitable settlements, but such joint commissions are usually recommended. Treaty provisions are often designed to promote settlement of disputes by agreement. Professor Bourne cited Canada's two main water treaties - the Boundary Waters Treaty and the Great Lakes Water Quality Agreement. In each case, there is provision for referring disputes to the International Joint Commission (IJC), a body with equal representation of Canada and the United States in its membership and functioning. The IJC has been much commended as a model for international cooperation between countries.

B.2 The Boundary Waters Treaty

This Treaty between Canada and the United States recognizes the principle of "territorial sovereignty;" that is, that each country has complete rule over the water within its own boundaries. The Treaty, however, also specifies constraints on this rule where the actions in one country might impair the use or availability of water in the other. For example, under Article 3, water levels in boundary waters are not to be altered without the consent of the IJC. Article 4 provides a prohibition against pollution. Thirdly, in the event that citizens are harmed in a downstream country (state, or province) the injured persons are entitled to sue in the courts of the upstream country and to receive the same remedies to which citizens of that country are entitled.

But, the provisions of this Treaty are not always effective at waylaying harmful impacts. For example, the law of the upstream state that is causing the harm may not provide any remedies against that harmful action, and this will, in effect, deny remedies to the citizens who are injured in the downstream state. In the case of the Great Lakes, the inadequacy of these provisions led Canada and the United States to enter into a special agreement.

B.3 Great Lakes Water Quality Agreement

The purpose of this Agreement was to enable Canada and the United States to deal with one of the main concerns relating to the Great Lakes; maintaining water quality. The Agreement enables these two countries to develop water quality standards and to provide the mechanisms for monitoring and maintaining these standards in the Great Lakes.

The Agreement has obviously not been entirely successful in achieving this objective, given the problems and controversies that still surround the Great Lakes. These issues concern not just water quality -- dealt with by the Water Quality Agreement -- but also water allocation between the U.S. and Canada -- dealt with under the Boundary Waters Treaty.

a. Water quality issues:

Professor Fairley argued that maintaining water quality in the Great Lakes is of greater significance to Canadians than to Americans since Canadian impacts on water quality are generally less than those of the U.S. states that border the lakes. He suggested that Canada's effort should focus on ways to influence the U.S.A. in 'cleaning up' the Great Lakes.

Formerly, the major problem in the Great Lakes was phosphate pollution, but this has been successfully managed through efforts undertaken in the earlier years of operation of the Agreement. Today the major problem concerns toxic wastes.

Toxic wastes pose particularly difficult problems for the legal system because so many factors fall into the realm of scientific unknowns; as Professor Fairley put it, they are "odorless, colourless, tasteless, but lethal." In dealing with the discharge of harmful waste material in a legal sense, a lawyer must be able to 'solve' two crucial questions: (1) in order to meet the "burden of proof," what is the source of the pollution? and (2) what are the impacts that determine the appropriate levels of a legal response? Obviously, solving these problems is much more difficult when little is known about the nature of the polluting substance. Moreover, gathering the knowledge necessary to deal with such problems is dependent on the priorities of the societies and governments involved; hence, dealing with toxic waste pollution is not just a legal problem but also a political, economic and social one. For instance, in the Great Lakes, Professor Fairley pointed out that presidential control over federal spending, coupled with de-emphasis on environmental concerns, were frustrating the cleanup obligations which had been agreed to between Canada and the U.S. in 1973.

Another problem is developing some consistency among federal, provincial and state statutes respecting the control of toxic substances. In the United States there is more coordination among jurisdictions than is the case in Canada with its separate provincial and federal jurisdictions. In the United States, minimum standards are established under federal legislation and these standards must be met by state legislation. Even so, this does not guarantee consistency among the U.S. states that must deal with pollution problems in the Great Lakes; Michigan and Ohio both border on the Lakes, but while Michigan has some of the most stringent legislation in the U.S., Ohio has one of the worst records in terms of implementing pollution control legislation in accordance with federal minimum standards.

b. Water allocation issues

Sharing the waters of the Great Lakes between Canada and the U.S. has two aspects; consumption of water by the population surrounding the lakes, and diversion of waters from the lakes to serve distant areas.

Water diversion has probably the greater "political profile" as a water-related issue, probably because of its immediate and dramatic impacts. One diversion proposal is often referred to as "pulling the plug in Lake Michigan," and would involve diverting water to the thirsty southwestern states. The Boundary Waters Treaty requires that any changes in levels of boundary waters must be approved by the IJC. However, proponents of the idea contend that Lake Michigan itself is not a boundary water (although it is connected to boundary waters). Therefore, it is not subject to reference to the IJC, and diversion could take place free of any legal obligations to Canada. But the impacts on the other Great Lakes, and to the populations on both sides of the border who depend on them, could be dramatic and costly. As a result, there is opposition in both the U.S. and Canada to any such scheme.[1]

While water diversion has a high public profile, increasing consumptive use in the Great Lakes region may be a more important problem in the long term. Professor Fairley referred to the disproportionate demand which the U.S. states are placing on Great Lakes waters, stating that the outlook for Canadians "doesn't look good." This increasing consumptive pattern is aggravated by the strong possibility of atmospheric changes that could alter climatic patterns on an international scale. Besides directly affecting water levels in the Lakes, this would lead to higher demands for water to offset drier agricultural conditions in the fertile regions around the Lakes as well as beyond, thereby further increasing the demand on the Great Lakes system. As one participant pointed out, even now, vast amounts of water are being used in steam plants, for nuclear cooling and for irrigation along with regular industrial and municipal uses. Yet, managers do not really know if these waters return to the Great Lakes system as rain or through runoff, or are dissipated elsewhere.

Many believe that it is the responsibility of the federal governments of Canada and the U.S. to tackle these and similar international problems through the IJC. Yet, many critics feel that the IJC has inadequate resources and staff for the studies that are necessary to gain the sound technical background for assessing increasing consumption and pollution. Under these circumstances, how can it be effective in recommending the basis for agreed action between Canada and the U.S. to protect our shared water resources? Should the IJC have greater authority in not just recommending but instigating and directing scientific and assessment studies? In terms of legal problems, should it have more court-like powers in adjudicating disputes between the two countries? Professor Bourne pointed out that rethinking the role of the IJC in a legal sense is a futile exercise, as neither country wishes to open up the Boundary Waters Treaty, which sets out the mandate of the IJC, for re-negotiation. Given those circumstances, how could the IJC, as it is, become a more powerful and persuasive force in water issues?

However reluctant Canada or the U.S. might be in re-assessing the terms of their agreements and treaties, these kinds of issues must be addressed soon if many of our shared water resources are to survive.

FOOTNOTES

1. If it were decided in the United States to proceed with diversion, though, what legal steps could opposing parties take? In the U.S., to start the project would require the acceptance of at least one Great Lake state, the states (probably southwestern) which are to receive the water, and all "transit" states in between. The project might be stopped by, for example, an interstate compact among the Great Lake states, but the U.S. Congress will have the final say.

On both sides of the border, a crucial question is whether private citizens can take any effective unilateral action if the federal governments of Canada and the United States cannot agree with respect to protecting water levels. In Ontario the provincial government has tabled legislation that grants "reciprocity" in Ontario courts to U.S. citizens who might be harmed by water-using activities in Ontario. "Reciprocity" simply means that certain rights -- in this case, the right of U.S. citizens to sue under Ontario law in Ontario courts -- are recognized in one country, state or province as long as the same rights -- the right of Canadian citizens to do the same in U.S. courts -- are recognized in the other. Some of the Great Lakes states, notably, Michigan, already have statutes which grant standing to Canadian litigants. According to Professor Fairley, the decision of the Ontario government to remove procedural barriers to foreign litigants in environmental protection cases provides a constructive alternative, in addition to direct international negotiation, for the mutual protection of common water resources in the Great Lakes from diversions and other threats to the Great Lakes ecosystem.

VIII. CONCLUSIONS AND RECOMMENDATIONS OF THE WORKSHOP

A. From the Discussions

1. Water allocation: Many provincial licensing and permitting systems still in operation were developed at the time Canada was being settled. As such, they are often inappropriate to deal with today's multi-use, high demand needs for water. Ideally, water allocation systems should be flexible and provide incentives to both conserve water and use it efficiently. To do this, the "ideal" system should provide for a process for periodically re-assessing water uses, and should allow water rights to be transferred to another use or divided among several uses to meet society's changing needs. The system should also allow the holders of water rights to negotiate use of these rights among themselves, subject to government approval. Finally, in regions where water resources are as yet unallocated, minimal flow requirements should be established before consumptive uses are considered, to protect the natural attributes of water systems.

2. Water quality: Setting and enforcing water quality standards are probably the central problems in water quality issues. Penalties or other forms of criminal action are methods typically used for enforcing standards, but bargaining and contract-making are becoming more prevalent. In a legal sense, the use of contracts and agreements opens up a very different field of law for the enforcement of standards, and lawyers, legislators, regulators and

those being regulated should be made aware of the advantages and disadvantages of using contracts versus prohibitions and penalities.

Secondly, what federal statutory laws require -- good ambient water conditions -- is often not what the regulatory systems associated with those laws provide -- which is control of waste discharge conditions. While controlling waste discharge is a more manageable task than controlling ambient conditions, efforts should be focussed on bridging the gap between setting waste discharge regulations for individual pollutants and knowing what their real effects, individually and in combination, are in different ambient conditions.

3. Solving interjurisdictional disputes: Dealing with interprovincial and federal/provincial disputes regarding waters that cross provincial or territorial borders was a foremost topic of discussion at the Workshop. Determining the nature and extent of federal government involvement in interprovincial matter was of particular concern. Some sort of interjurisdictional water law is needed to deal with interjurisdictional issues, and the Workshop participants agreed that such a law should have the following characteristics:

1. it should be able to resolve conflicts among two or more jurisdictions, federal or provincial;
2. it should be compulsory and enforceable;
3. it should respect, as much as possible, provincial authority in water law and thereby avoid federal-provincial conflict.
4. it should enable developments to proceed in appropriate cases with reasonable settlement on both sides.

As for a federal role, the options discussed ranged from no involvement to direct assumption of control as soon as a conflict arises -- each of which has political as well as legal 'pros and cons'. The Workshop participants agreed, however, that developing an Act that would set out the steps of a process to be followed in the event of an interprovincial dispute over water was the most reasonable legal action to take. The statute would have to be a federal one with counterpart provincial legislation and it would be aimed at all levels of jurisdiction. Any agreements resulting from the procedures set out in the Act would be binding on all parties. Such a process-setting statute would be more constitutionally and politically acceptable than an Act that would provide for direct federal intervention in interjurisdictional disputes, in that the provinces and territories would likely be more willing to follow rules for finding agreement among themselves than to have a 'solution' to a dispute imposed by a federal authority.

4. Northern water management: While the management system in the northern territories seems to avoid some of the issues faced in the provinces, problems still exist in managing and planning the present and future use of water resources. Making the territorial Water Boards directly responsible for a water use "authorization" process, and accountable to both territorial and federal Ministers, was suggested as a step to achieving a more comprehensive and accountable water allocation system. Water licensing and authorization should occur in conjunction with a more planned approach to managing water together with land. Finally, the legal uncertainties surrounding jurisdiction over Arctic offshore waters and aboriginal rights

to water should be clarified to allow planning of this relatively pristine resource to go forward in a rational way.

5. Indian reserves: The major issues identified with Indian reserve lands were whether the beds of rivers and lakes were actually part of reserves, and what are the nature and extent of the water rights of Indians on reserves. Resolving these questions is significant in terms of managing the waters that flow through reserve lands, particularly in the prairie provinces where the water ways are vital to the agricultural economy.

6. International water issues: The International Joint Commission has served many useful purposes. But in light of increasing pressures on the water resources shared by Canada and the United States, its role should perhaps be reviewed, particularly with an eye to improving its "powers of persuasion" with both federal governments.

In the meantime, those opposed to proposals that can cause major diversion or pollution problems should look for alternative methods to protect their interests. Enhancing the legal power that private citizens have to sue those who harm their water resources is one example of such an alternative.

B. Research Priorities

As its final request to the Workshop, the members of the Inquiry asked the participants to pin-point what they felt are major priorities for further research with respect to Canadian water law.

1. In approaching a research program, it is important at the outset to define what are legal versus political problems. Research on legal issues can be proposed and conducted in a largely objective and systematic manner. But research on political problems is a much more diffuse activity, which needs both the cooperation and motivation of decision-makers in order to make any worthwhile contributions.

2. High on everyone's list of priorities was the need to fill the vaccuum in the field of interjurisdictional law; to develop a legislatively-based process for resolving interprovincial and federal-provincial disputes over water resources.

With respect to developing an interjurisdictional law, research is needed into what 'laws' -- formal or informal -- already govern interjurisdictional actions. We also need to look more closely at current legislation, particularly the present Canada Water Act -- Part 3 of which was originally designed to authorize interjurisdictional water basin management but to date has hardly been applied. Where it has been used, success in resolving complex water issues has been indifferent. What are the characteristics of Part 3 of the Act that have lead to its lack of application and success?

Also relating to developing an interjurisdictional water law, it would be useful to examine various ways to establish mediation and arbitration procedures. What processes have been used elsewhere that have met with success in terms of resolving an issue in an acceptable way even if the solution was not everyone's first choice.

3. There is a need to find ways to coordinate jurisdictions over water -- to reduce the fighting between governments, but also between departments within the same government. Legal or policy mechanisms need to be found that would allow departments and governments to focus more effectively on water issues -- mechanisms that would address such problems as uniformity and complimentarity of laws (both between and within jurisdictions), better allocation of responsibilities among departments, and better coordination and handling of other departmental mandates.

4. In developing a 'better-process' for water allocation, research is needed in finding the necessary legal instruments and appropriate economic principles. Among these instruments and principles, there should be ways found to re-allocate water rights to their 'best' use and fairly compensate those who lose all or part of their water rights.

5. It is crucial to many parts of Canada that aboriginal rights to water be defined, both on and off reserve lands. Research is needed into the effects of constitutional entrenchment of aboriginal rights, the impacts of native land claims as they are negotiated on determining rights to water, and on the rights of native people as riparians owners of land.

6. Research on the individual rights of riparian owners should be aimed at better determining the nature of these rights as they exist in Canada. This is especially critical in areas -- such as the North -- where many riparian uses of water are exempt from water licensing systems.

7. In the North, research should be aimed at finding better means to share management responsibilities for water resources between the federal and territorial governments. As well, in keeping with federal policy to devolve jurisdiction over land and resources to the territories, research should be aimed at finding ways to smoothly pass these responsibilities from federal to territorial agencies.

8. The federal profile with respect to interjurisdictional and international water issues is presently not very high. Ways should be found to raise this profile in a politically palatable manner, so that the federal government can be effective in getting 'the ball rolling' and getting parties together to negotiate agreements where they are needed.

9.. Finally, one Inquiry member expressed disappointment in one characteristic that seemed to pervade the Workshop and the legal profession in general; the lack of emphasis on innovation in the philosophy of law and its approach to dealing with natural resources. For instance, laywers and the law tend to treat resources on an individual basis, whereas what we call 'resources' are all parts of an interconnected natural system. What we do to one 'resource' has repercussions on many others and on the system i general -- and ultimately on us. The legal profession should be encouraged to review its own traditional approaches and to research new legal and legislative frameworks that would deal with a 'holistic' approach to managing and regulating our aquatic and terrestrial environment.

APPENDIX A. BASIC WATER LAW

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1.0 COMMON LAW RIPARIAN RIGHTS

1.1 Common Law. To gain an understanding of water law in Canada it is necessary to begin with an understanding of the basic common law rules applying to water resources in the common law provinces. However, these common law rules provide only a starting point as they have been extensively modified or even replaced by statutory law.

1.2 No rights in water *per se*. There are no common law rights of ownership respecting water occurring in its natural state other than those incident to ownership rights in land.

1.3 Water as personal property. When water is contained under the control of a person (in a swimming pool, for example) it is personal property of that person like any other chattel.

1.4 Water rights as incident to land - riparian rights. Ownership rights with respect to water that are incident to ownership rights in land require such ownership rights in land to be in the banks or bed of the lake, river or stream. These ownership rights in water so incident are known as riparian rights to water.

1.5 Riparian rights defined. Riparian rights are:

(i) right to access to and from the water;

(ii) right to receive the water flowing past undiminished in quantity and quality, subject to use for domestic and ordinary purposes; there is a corresponding duty to allow water to flow downstream undiminished in quantity and quality subject to use for domestic and ordinary purposes

(iii) right to fish;

(iv) standing to sue in tort for nuisance or waste.

1.6 Riparian rights in tidal waters. Riparian rights are recognized with respect to ownership of land abutting coastal waters as well as fresh waters. These are modified to reflect the common law public rights of fishing and navigation and to recognize that there are no upstream/downstream characteristics. Consequently, riparian rights respecting coastal waters are significant mainly with respect to access and torts of nuisance and trespass.

1.7 Water boundaries. Common law rules respecting boundaries of land have special characteristics of importance to ownership rights in water. These concern (i) the interpretation of deeds and other instruments whereby, in the absence of express contrary words, a deed of land bounded by a body of water is deemed to include the banks and bed of the body of water *ad medium filum* ("to the middle line" of the stream, etc.); and (ii) rules of accretion and dereliction which result in the physical adjustment of boundaries abutting bodies of water as natural changes occur by way of accretion or erosion of the bed and banks.

1.8 Non-transferability of riparian rights. These common law riparian rights are incidents of ownership of the bed and/or banks and cannot be detached therefrom except for the right to fish. Consequently, ownership of riparian rights could be transferred from A to B only by transferring ownership of the bed and/or banks from A to B. The right to fish, could be transferred independently of ownership of the bed or banks.

1.9 Limits on use. Also, the rights of use of water in terms of flow and quality pertain only to the "appurtenant" land ownership, that is, the parcel of land including the ownership of the bed and/or banks. The right to use water by owners of remote (non appurtenant) parcels of land could not be established under the common law.

2.0 RIPARIAN RIGHTS MODIFIED BY STATUTE

2.1 In general. In all jurisdictions in Canada these common law riparian rights have been substantially modified by statute law. In the older jurisdictions of Ontario and the Atlantic provinces, the modifications have been piecemeal, resulting in hybrid combinations of common law and statute law. In the newer parts of Canada (the western provinces and Yukon and Northwest Territories) the statutory modifications have virtually displaced the common law rules.

2.2 Statutory modifications in British Columbia. The law of British Columbia will be used as an example to illustrate the extent of statutory modifications of the common law.

2.3 Ownership of water in Crown. Ownership rights in water in its natural state are vested in the Crown and deemed always to have been so vested.

2.4 Ownership of beds in Crown. Ownership of the beds of all lakes, rivers and streams is vested in the Crown and deemed to have been always so vested, subject to some existing rights and to the making of express grants by the Crown.

2.5 Ownership of "game fish" in Crown. Ownership rights with respect to "game fish" are vested in the Crown.

2.6 Water boundaries. Water boundaries are determined by provisions of the *Land Act* and the *Land Registry Act* rather than by the common law. The common law rules of accretion and dereliction may still apply.

2.7 Rights to use water - necessity of licence. Riparian proprietors of land can use water for domestic purposes without a licence. Otherwise rights to use water can be acquired only by obtaining the grant of a licence under the *Water Act*.

2.8 No discharges without permit. Riparian proprietors have no right to discharge wastes into water except as authorized by a permit issued pursuant to the *Waste Management Act*.

2.9 Rights of riparian proprietor to sue in tort. Riparian proprietors probably can sue for damages for nuisance resulting from deposits of wastes or other acts causing deterioration in water quality, but cannot sue for interference with flow by licensed users. If all water flow is recorded (licensed), the right to use for domestic purposes is lost.

2.9.1 Access in case of tidal waters. Riparian rights of access in the case of tidal waters are unimpaired.

3.0 THE NATURE OF STATUTORY MODIFICATIONS - WATER FLOW, BRITISH COLUMBIA

3.1 Licensing: appurtenant land. In British Columbia the emphatic need for water to work the alluvial gold deposits in the Fraser River Canyon and the rivers of the Cariboo country led to early reversal of riparian water law in favour of a system of licensing water users. A right to impound or divert water could be acquired by application, with notice posted on the ground and gazetted. The use had to be appurtenant to land, and could not be transferred independently of the land, but the land did not have to be riparian in nature. For remote land, the licence to use water carried with it the right to expropriate any necessary easements across adjoining lands to carry the water to the land. This system obviously served irrigation interests in the dry interior of the province as well as miners.

3.2 Terms of licence. Subject to consideration of the interests of downstream licence-holders (with or without a public hearing), the Water Comptroller grants licences, initially a Conditional Licence and ultimately (though not always) a Final Licence, setting forth the appurtenant land and the authorized use (impoundment, diversion, etc.), the required flow characteristics and the nature of the engineering or other works authorized in connection with the use.

3.3 Priorities. Once issued, the licence provides priority of use according to the date of its issue, and is for an indefinite duration.

3.4 Supervision. The staff of the Water Management Branch maintains supervision over the licensed uses to ensure compliance with terms and conditions.

3.5 Cancellation. A licence can be cancelled for non-use.

3.6 Ground water. The Water Act potentially includes ground water in the licensing system but the provisions of the Act extending licensing to include ground water have not been brought into effect.

4.0 THE NATURE OF STATUTORY MODIFICATIONS - WATER QUALITY, BRITISH COLUMBIA

4.1 In general. In all jurisdictions in Canada statute law has been enacted to protect water quality. In the federal legislation applying in Yukon and the Northwest Territories, water use and water quality are licensed by one Water Board under one statute - the Northern Inland Waters Act. But in most provinces the legislation dealing with water quality is separate from the legislation authorizing the licensing of water uses. In British Columbia, the applicable statute is the Waste Management Act.

4.2 Waste permits. Under the Waste Management Act all deposits of waste in air or water must be authorized pursuant to a waste management permit issued by the Waste Management Branch. The permit will set forth specific limits respecting suspended solids and heavy metals and other toxics, etc., that must not be exceeded at the point of discharge. The Branch monitors effluent discharges for conformity with the terms and conditions of the permit. If enforcement is necessary, it is gained through prosecution for violation of the terms and conditions of the permit. Appeals against the terms and conditions of permits can be taken by an "interested person" to an Appeal Board established under the Environment Management Act.

APPENDIX B. MEMORANDUM ON RIPARIAN RIGHTS

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In this memorandum six issues will be considered.

1. What are riparian rights?
2. How effective are riparian remedies to preserve water flows? water quality?
3. In what respects (why) do common law riparian rights need modification to ensure optimum social/economic benefits from the water resource?
4. Do riparian rights exist to any degree under water licensing regimes?
5. To what extent are riparian rights altered by waste management statutes?
6. To what extent does the private right to fish still exist in Canada?

ISSUE #1: What are riparian rights?

Riparian rights were introduced in western Canada as part of the general body of United Kingdom law received in British Columbia in 1858 and in the Northwest Territories of Canada in 1870. Under the doctrine a landowner had no property in water which either percolated through his land or flowed through it in a defined channel. The doctrine followed from the premise that water should be regarded as public property that cannot be exclusively owned like real property.

In the case of percolating water the landowner was able to draw off any or all of it without regard to the claims of neighbouring owners: Chasemore v. Richards [1857] 7 H.L.C. 349. In the case of instream flows the owner of land through which the water flowed could not take all of the water but had certain valuable rights. Riparian rights to instream flows are concerned with both 1) flow (or quantity) and 2) use (or quality). These rights include:

1. The right to receive water substantially undiminished in flow and use.
2. An unlimited right to use water for "domestic purposes". That is, the right to take and use all water necessary for ordinary purposes connected with his riparian tenement, for example, the irrigation of a small ninteenth century holding.
3. The right to use water for "secondary" or "extraordinary" purposes as long as it is reasonable for purposes connected with riparian property:

ISSUE #2: How effective are riparian remedies to preserve water flows? water quality?

A riparian has two possible remedies when his rights are interferred with: damages and injunctions. If a riparian's right to quantity or quality is interferred with and substantial damages result, he will receive damages accordingly. However, if his right is only interferred with and no actual damage results, he is merely entitled to nominal damages: McKie v. K V.P. Co Ltd. [1949] 4 D.L.R. 497 (SCC). McKie was concerned with water quality.

An injunction will be granted for the breach of a riparian right, even though no direct harm has resulted to the riparian. LaForest, Water Law in Canada: the Atlantic Provinces (1973), 214 notes that the justification for an injunction in such circumstances is that a riparian's interest in land may be permanently prejudiced if the pollution of a stream or reduction in flow continued so as to found a prescriptive right in the defendant.

The preservation of water flows is subject to the standard of reasonable extraordinary use. If, therefore, the defendant can establish that, i.e., the diversion of the stream was reasonable, the riparian's cause of action will fail. For this reason the preservation of water flow is not well protected by riparian remedies.

The preservation of water quality is more adequately protected under the riparian system. As noted above, a riparian in the absence of proof of damage, will be limited to nominal damages if the water is polluted. However, in the absence of damages, an injunction will be issued as a matter of course if he can establish that the water has been polluted: McKie supra; Crowther v. Town of Cobourg [1912], 1 D.L.R. 40. Only where the injury to the plaintiff-riparian is small, capable of monetary compensation, and it would be oppressive to the defendant to grant an injunction will an injunction not be granted: Howich v. Holden Village [1960] 32 W.W.R. 491. It should be noted that an injunction may be stayed to give the defendant time to alter his operations so as to stop the injury.

It should be noted that it is no defence that the defendant's action alone would be insufficient to cause damage: Crowther supra, or that the water was already polluted before the defendant introduced a deliterious substance into the stream. McKie supra. LaForest states that to hold otherwise would be to deny the riparian-plaintiff a remedy when there are several wrongdoers.

ISSUE #3: In what respects (why) do common law riparian rights need modification to ensure optimum social/economic benefits from the water resource?

Percy, "Water Rights in Alberta" XV Alta. Law Rev. (1977) at pp. 143-144 states that the riparian system had three inherent defects when applied to western North America: 1) the limitation of water use to riparian land in the dry climate of the prairies inhibited the development of those lands removed from water sources; 2) major consumptive uses were denied to riparians (i.e., large scale irrigation projects which would substantially reduce water flow); 3) a lack of priorities among riparians themselves when water became particularly scarce.

Scott adds two further problems with the system which served to exaggerate the limitations of the system: 1) The riparian doctrine, unless modified, worked against the making of bargains by which in a dry season or year a user could acquire a secure or preferred supply for himself: 2) It created a presumption that secure water flows and consumption must not be transferred within the water basin or beyond it without unanimous continuing consent from all other riparians and potential riparians. Scott summarizes the riparian system's defects as follows:

> These limitations would have prevented miners and ranchers from diverting water, ranchers and riparians from making bargains, and perhaps worst of all, entrepreneurs from investing in major works to impound, carry, and store water where it would most pay.

An additional probelm was that, in theory, contracts with a riparian could be made concerning future use, such contracts could not be inherited by future riparians. In short, the system was not suited to the development of mineral resources (California, British Columbia) or agriculture and ranching (the Prairies).

In response to the inherent defects of the riparian system the doctrine of prior appropriation was developed in the southwestern United States as the least cost alternative to riparian rights. The doctrine was developed by custom and judicially confirmed. Three elements formed the basis of this new doctrine: 1) common law rights for future potential users were ignored; 2) water was assigned to whoever first appropriated it; 3) each right was limited to a stated quantity.

In Canada, although the riparian system had proven incapable of maximizing the economic potential of the surface water, the courts were bound by U.K. precedent and unable to modify riparian law. For this reason legislation was enacted to meet the exigencies of the day. The 1894 Northwest Irrigation Act established the principle of prior appropriation in western Canada through the means of a licensing system. This system has persisted and is evident in the present water rights legislation of the four western provinces and the Northwest Territories.

ISSUE #4: Do riparian rights continue to exist to any degree under water licensing regimes?

The importance of this issue lies in the fact that if riparian rights persist, private water rights may be protected by judicial action in lieu of action by statutory water management agencies. As the Canada West Foundation Report, Nature's Lifeline: Prairie and Northern Waters, states: "Depending on one's view, either private rights or the integrity of water management plans may be at serious risk."

In British Columbia there is some question as to whether the Water Act R.S.B.C. 1979, C. 429 abolishes riparian rights altogether or merely modifies them. Armstrong, in his article, "The British Columbia Water Act: The End of Riparian Rights" 1 U.B.C. L. Rev. 583 (1962) argues that the B.C. Water Act eliminates all riparian rights in the province. His argument is as follows: S. 2 of the Act vests all provincial waters in the Crown, except in so far as private rights have been established under licences issued or approved under the Act or a former act. He contends that pre-1925 statutes contained a clause expressly securing the rights of a riparian proprietor to use water for domestic purposes. This clause was dropped in 1925 and replaced by what is now S. 42(2): "It is not an offence for a person to divert unrecorded water for domestic purposes... but in a prosecution under this act the person diverting the water must prove that the water is unrecorded". Armstrong states that such a clause is a clear indication that riparian rights to use and flow exist only on sufferance.

The contrary view is that the Water Act does not take away private rights but gives the Crown new rights superior to private rights upon the exercise of the Crown rights. In Cook v. Vancouver [1914] A.C. 1077, the Privy Council held that a downstream riparian had no right of action when the flow of the stream was diminished under licence from the Water Act. In a later case, Johnson v. Anderson [1937] 1 WWR 245 it was held that the Act only abrogated riparian rights to the extent that upstream appropriations had been licenced and that riparian rights still existed as against an upstream unlicenced diversion.

In regard to water quality, the Water Act S. 2 only vests in the Crown the right to use and flow and would, therefore, seem to refer only to utilization of quantities of water. Nothing is said concerning the right to receive water in undiminished quality. On the canon of construction that a legislature shall not be presumed to take awaya private right without express language, it would seem that the Water Act does not abolish this right.

To conclude, the better view would seem to be that "riparian rights continue to exist in British Columbia, at least to the extent necessary to allow a riparian proprietor to maintain a pollution action. Certainly the riparian's right to use water has been abridged to the extent that it interferes with the rights of licenced appropriators": Lucas "Water Pollution Control Law in B.C." 4 UBC. L. Rev. 56 at 82.

ISSUE #5: To what extent are riparian rights altered by waste management statutes?

The Waste Management Act, R.S.B.C. 1982 c. 41 does not purport to abolish the riparian right to bring a pollution action. The Act does, however, eliminate the right to use water for waste disposal without a permit: s. 3. As Lucas (*supra* at p. 82) notes "The important distinction is that between the active right to use water for waste disposal purposes, and the passive right to receive water of natural quality adjacent to one's land."

The question is: what effect does a permit have upon a riparian's ability to maintain a pollution action against the permittee? There seems to be little question that a permittee under the Act will be liable to the riparian owner if he exceeds the terms and conditions of the permit (see Lucas *supra* at p. 84). Where a permittee is meeting the terms and conditions of the permit an action may still be maintained against the permittee by the riparian owner on the presumption that the legislature did not intend the power to authorize waste disposal to diminish the private rights of riparians. There are two contrary positions. Firstly, it could be argued that a permit provides a statutory defence. Alternatively, a permittee could assert, in discharging the onus of demonstrating a reasonable use to defend against the action, that the terms and conditions of the permit are evidence of what is reasonable.

The better view (see Lucas supra at pp. 84-85) is that a permit should not be seen to authorize pollution. The Act does not authorize the nuisance of pollution but, to the contrary, was enacted to regulate waste disposal in a manner which prevents or, at least, controls pollution.

Issue #6: To what extent does the private right to fish exist in Canada?

1. Tidal Waters: At common law there is a public right to fish in tidal waters. An exclusive private right to fish could only be established in two ways: (1) by a Crown grant to an individual either with or distinct from the soil prior to the Magna Carta which abolished this perogative of the Crown but maintained prior grants and (2) by prescription (presumed lost grant) if enjoyed as a separate and distinct right of property before legal memory. It has been found that neither method could be established in Canada which was settled after the Magna Carta: Donnelly v. Vroom et al. (1907) 40 N.S.R. 585.

2. Non-tidal Waters: The grant of the bed of a lake or stream carries with it the exclusive right to fish in those waters unless the lake or stream is tidal at that point: McKie, supra. It has been held in the past that where ownership of the bed is in the Crown the public has a right to fish whether the water is tidal or not: McDonald v. Linton (1926), 53 N.B.R. 107 per Barry C.J. This, however, is not the view presently accepted; LaForest, supra at p. 236. It is submitted that where, as in B.C. (see Land Act, R.S.B.C. 1979 c. 234, s. 52), the beds of non-tidal waters are for the most part owned by the Crown in the right of the Province an individual may normally acquire the right to fish only by a lease or licence from the Crown (see LaForest, supra at p. 236).

APPENDIX C. CONSTITUTIONAL ASPECTS OF WATER LAW

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Introduction

In Canada, a federal state, legislative power is allocated between provincial and federal legislative levels by the Constitution. Where, as with water resources, the subject matter has both national and provincial dimensions, both levels may lay claim to legislative competence with varying degees of justification.

Under s. 109 of the Constitution Act water is owned by the provinces and by s. 92(5) is subject to provincial management and sale. Three other provincial heads of power may confer provincial legislative power over some aspects of water resources: s. 92(10) "local works and undertakings"; 92(13) "civil and property rights"; and s. 92(16) "matters of purely local and provincial concern." The 1982 resource amendment, s. 92A, is mainly concerned with non-renewable resources, but s. 92A(1) (c) may grant further powers to the provinces over water resources: see Issue #3 below.

Under the Constitution Act the federal Parliament may lay claim to legislative authority over water resources in two respects:
(1) directly, through its residual power, in the preamble to s. 91;
(2) indirectly, under the federal heads of power in s. 91(10) (navigation) and s. 91(12) (fisheries).

It is this overlap in the allocation of legislative competence over water resources which has and will continue to result in consitutional conflict between these two legislative levels in Canada. The conflict gives rise to the following issues:

1. In what circumstances would federal legislation concerning water development or quality on interjurisdictional waters be intra vires the federal residual power in the preamble to s. 91 of the Constitution Act?

2. How does the federal legislative power over fisheries affect provincial water management?

3. How does the federal legislative power over navigation affect provincial water management?

4. Are provincial water management statutes applicable to interprovincial works which are federally regulated?

ISSUE #1: In what circumstances would federal legislation concerning water development or quality on interjurisdictional waters be intra vires the federal residual power in the preamble to s. 91 of the Constitution Act?

The Constitution Act does not specificaly allocate legislative competence over interjurisdictional waters to the federal Parliament. Authority over such rivers, therefore, is within the constitional framework outlined above. In the preamble to s. 91 of the Constitution Act the federal Parliament has the residual power to legislate for "peace, order, and good government." It has been asserted that the residual power (POGG) may be used to sustain federal legislation concerning interjurisdictional waters: Gibson. "The Constitutional Context of Canadian Water Planning," 7 Alberta Law Review, 1969, pp. 71-81. There is some judicial support for this view. Pigeon, J. commented in Inter-provincial Co-Operatives Ltd. v. The Queen in the Right of Manitoba, [1976] 1. S.C.R. 477, that the federal residual power could sustain federal legislation in the realm of interjurisdictional water pollution control where it could be shown that the matter was one of national concern. The position taken by Gibson and Pigeon, J. underlies The Canada Water Act c. 5 (1st Supp.) s. 11(1) which allows the federal minister to designate a water quality management area to regulate the water quality of interjurisdictional waters (even in the absence of agreement with the relevant provincial governments) where water quality has become a matter of "national concern."

There is, however, since the Anti-Inflation Reference, [1976] 2 S.C.R. 373 (S.C.C.), great uncertainty as to what test should be used to determine the vires of any legislation founded upon the federal residual power. Prior to the Reference every POGG case after the abolition of appeals to the Privy Council had been decided by the Canada Temperance test. This test, as advanced by the Privy Council in A.G. Ontario v. Canada Temperance Foundation [1946] A.C. 193 at 205-206, speaks of a national concern to sustain the federal residual power:

> . . . the true test [of the residual POGG power] must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole . . . then it will fall within the competence of the Domminion Parliament as a matter affecting the peace, order, and good government of Canada although it may in another aspect touch on matters speciallly reserved to the provincial legislature.

In the Anti-Inflation Reference a majority of the Supreme Court of Canada (7/9) held that anti-inflation legislation was intra vires s. 91 as a matter affecting "peace, order, and good government" because it was in response to a recognizable national emergency. The two dissenting justices accepted the emergency test for s. 91 but could not find a recognizable national emergency. The continued efficacy of the Canada Temperance test, however, was left in considerable doubt. Of the seven in majority, four, led by Laskin, C.J. were of the opinion that the legislation could have been sustained on the basis of the Canada Temperance test. The dissent, written by Beetz, J. felt that the Canada Temperance test could not have sustained the legislation and three of the majority led by Ritchie, J. agreed with the dissent on this point of law. Five of the nine justices, therefore, rejected the Canada Temperance test in this instance.

The Reference raises the question of how the emergency and Canada Temperance tests can be reconciled. It is submitted that there are two possible methods of reconciliation. Firstly, it could be argued that federal legislation affecting provincial jurisdiction over property and civil rights must satisfy the emergency test while federal legislation that affects some other head of provincial power need only satisfy the Canada Temperance test. This distinction, however, has never been accepted. In both Johannesson v. West St. Paul [1952] 1 S.C.R. 292 and Munro v. National Capital Commission [1966] S.C.R. 663 the respective pieces of legislation at issue concerned property and civil rights but it was the Canada Temperance test that was applied. For this reason Hogg in Constitutional Law of Canada (1977) at p. 263 rejects this distinction.

The second method of reconciliation was first forwarded by Lederman in "Unity and Diversity of Canadian Federalism: Ideals and Methods of Moderation" 53 Can. Bar Review 597 (1975) and accepted by Beetz, J. and four others in the Reference. This method ascribes two functions to the residual POGG power: 1) It gives the federal Parliament permanent jurisdiction over "limited and specific" matters such as aviation and atomic energy which do not fall within the provincial enumerated heads of power in s. 92. Legislation concerning such matters must only meet the Canada Temperance test; 2) The federal Parliament has temporary jurisdiction over all subject matters in the case of a national emergency. Federal legislation over pervasive or sweeping matters such as pollution or the environment which include provincial heads of power, therefore, must satisfy the emergency test. Hogg, supra at p. 264 notes that, on this dual function of POGG, an emergency is not simply an example of a matter of national concern but something more which justifies a temporary alteration of the accepted distribution of legislative power in Canada.

It is concluded that the second method of reconciliation is the most satisfactory. If the Canada Temperance test was applied to federal legislation over such pervasive matters as the environment and pollution the reach of the federal residual power would be virtually unlimited and would allow the federal government to trench upon provincial jurisdiction. This view is supported by a majority of the Supreme Court of Canada in the Reference. The conclusion accepts Pigeon, J.'s comments in Inter-provincial Co-operatives that the federal residual power could be used to control pollution of interjurisdictional waters as exemplified by s. 11(1) of The Canada

Water Act but only to the extent that a national emergency could be demonstrated. The same argument would hold true for federal legislation pertaining to the development or diversion of interjurisdictional waters.

It is argued that two recent cases cast doubt on this conclusion: Schneider v. British Columbia (1982) 43 N.R. 91 (S.C.C.) and Canada Metal Compnay Ltd. v. R. [1983] 2 W.W.R. 307 (Man. Q.B.). In Schneider the Supreme Court of Canada found that British Columbia's heroin addiction legislation was within provincial jurisdiction over local and private matters. The Court did not refer to the Anti-Inflation Reference but the decision seems to indicate that if the failure of one province to legislate over a particular matter within its competence endangers the interests of another province, federal legislation to correct the problem based on the federal residual power may be sustained.

In Canada Metal the Court found the Clean Air Act s.c. 1970-71-72, c. 47 to be intra vires the federal residual power as it was "narrow and specific legislation" to control inter-provincial pollution.

ISSUE #2: How does the federal power over fisheries affect provincial water management?

The Canada West Foundation Report, Nature's Lifeline: Prairie and Northern Waters at p.5 states: "Perhaps the major area of current constitutional conflict relevant to water concerns federal powers in relation to fishery protection and provincial jurisdiction arising from ownership and management of public resources."

The Fisheries Act, R.S.C. 1970, F-14, comes under the federal power in relation to Sea Coast and Inland Fisheries (s. 91(12)) of the Constitution Act. In The Queen v. Robertson [1882] 6 S.C.R. 52 it was held that the federal power in this respect went no further than "what may be necessary for legislating generally and effectually for the the regulation, protection, and preservation of the fisheries in the interests of the public ...". Two recent cases have decided that the Fisheries Act is intra vires only to the extent that its provisions are linked to the protection of fish: Fowler v. The Queen (1980), 32 N.R.230, 113 D.L.R. (3d.) 513 (S.C.C.) and Northwest Falling Contractors Ltd. v. The Queen (1980) 113 D.L.R. (3d) 1. In Fowler s. 33(3) of the Fisheries Act was ruled ultra vires because the prohibition on the deposit of slash, stumps, or debris in water frequented by fish was too wide and not linked to the protection of fish. In Northwest s. 33(2) of the Fisheries Act was ruled intra vires as the definition of "deleterious substance" limited the application of s. 33(2) to deposits which threatened fish.

These two cases were applied in A.G. of Canada v. The Aluminum Company of Canada Ltd. (1980) 115 D.L.R. (3d.) 495 (B.C.S.C.). In Alcan the vires of s. 20(10) of the Fisheries Act was at issue. Berger, J. held that the section's delegation of power to the minister to ensure that there was such quantity of water in a stream as necessary to guarantee the safety of fish was intra vires as it was power for the protection of the fishery. This power allowed the minister, therefore, to regulate other activities unconnected with the fisheries.

Two recent B.C. cases support the view that the federal power is related to a "fishery" and not to "fish" per se: R. v. MacMillan Bloedel (Alberni) Limited (1979), 12 BCLR 29 and R. v. Crown Zellerbach Canada Limited, 13 Canadian Environmental Law Reports 29 (B.C.C.A.). The latter çase held that the Ocean Dumping Control Act, S.C. 1974-75-76, c. 55, s. 4(1) was ultra vires federal legislation as it was not linked to harm to fisheries or interference with navigation. It is, therefore, submitted that where the Fisheries Act provides for the protection of the fishery, it is intra vires even though it may by necessary implication involve the regulation of water management and development within the province.

ISSUE #3: How does the federal power over navigable waters affect provincial water management?

By s. 91(10) of the Constitution Act "navigation and shipping" is a federal power. Parliament, therefore, can make legislation concerning any "navigable" water in a province. "Navigable" water is any water in which a log or canoe can float. The Navigable Waters Protection Act R.S.C. 1970, c. N-19 is a federal statute enacted under s. 91(10) and provides another basis, as yet relatively unused, for intervention into provincial management by the federal minister. For example, by s. 6 of the Act the federal minister may order the removal or destruction of any work (bridge, boom, dam, wharf, pier, tunnel, pipe) which has not complied with the provisions of the Act. Federal legislation based on s. 91(10) must link the prescribed conduct with interference with navigation: R. v. Crown Zellerbach, supra.

The 1982 resource amendment, s. 92 A(1)(c), which confers exclusive legislative power on the provinces over "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy" may be advanced by the provinces for the proposition that hydro-electrical works such as dams should be free of federal interference under s. 91(10) or s. 91(12). The view, advanced by Professor Percy, however, is that the ammendment should be read subject to the federal heads of power in s. 91 and not read so as to derogate from those federal powers.

ISSUE #4: Are provincial water management statutes applicable to interprovincial works?

On this issue there is no direct judicial guidance. The issue's importance, however, becomes evident where provincial water management standards come into cnflict with federally regulated activities such as pipelines and railways. The Canada West Report suggests, at s. 54, that "there is a strong likelihood that the provincial water legislation would be held applicable".

APPENDIX D. FEDERAL/PROVINCIAL JURISDICTIONAL ISSUES

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A. INTRODUCTION

In preparing this background paper, the writer was asked firstly to identify key legal issues involved in federal/provincial relations, including a reference to the effect of s. 92A of the Constitution Act, and secondly to comment on inter-jurisdictional relations, especially with reference to Prairie and Northern Rivers.

The former topic, which will be discussed in Part B of this background paper, involves a basic analysis of constitutional law and its effect on federal/provincial relations. The second topic, which will be discussed in Part C of this background paper, raises inter-connected questions of Constitutional Law and Conflict of Laws.

B. KEY LEGAL ISSUES INVOLVED IN FEDERAL-PROVINCIAL RELATIONS

In the light of the importance of water to the development of Canada both in the past and in the present day, it is perhaps surprising to discover that major questions of constitutional jurisdiction are surrounded by considerable uncertainty. The courts have rarely addressed fundamental questions of jurisdiction over water, except in some leading cases which occurred at the end of the 19th century. The absence of a definitive body of constitutional law with respect to water means that many issues, particularly concerning inter-jurisdictional waters, remain uncertain and that their discussion, in the absence of any clear legal precedent, tends to be clouded by the preferences of the commentator.

In order to provide a realistic appraisal of the present state of the constitutional law of water, the following section of this background paper will provide a summary of jurisdictional issues from a provincial perspective. Then, in section two, an effort will be made to identify the arguments which might support a greater federal role in water management. In the third section, the implications of the present state of legal uncertainty will be considered.

1. Jurisdiction Over Water: The Provincial Perspective

In a federal state, jurisdiction over water management must, of course, be divided between the two levels of government, because water has both national and local dimensions. In Canada, the traditional view has been that the bulk of the power to deal with water resources lies with the provinces, because the original scheme of the British North America Act and, in the case of the western provinces, of the Natural Resources Transfer Agreement, effectively vested control or ownership of most bodies of water in the individual provinces. The fact of provincial ownership of water carries with it considerable legislative power, particularly by virtue of the exclusive provincial jurisdiction over property and civil rights within the province, local works and undertakings and the management and sale of public lands under ss. 92(13), 92(10) and 92(5) respectively of the Constitution Act. However, although the provinces have considerable legislative power over water, their jurisdiction is by no means unfettered because of the existence of specific heads of federal power in the constitution. These federal rights to legislate in respect of water limit absolute provincial authority over all significant bodies of water and are particularly relevant in the case of inter-jurisdictional water ways.

Some federal powers under the constitution are potentially important in the development of water resources, because they can be related to specific aspects of water development. Thus federal jurisdiction over both agriculture and national parks may in appropriate cirumstances permit federal involvement in water projects. However, other federal powers have a direct and continuing impact on water management. The most significant apsects of direct federal jurisdiction over water are provided by the navigation and fisheries powers, each of which will be briefly described in turn.

(a) Navigation

Under s. 91(10) of the Constitution Act, the federal Parliament possesses exclusive legislative authority over navigation and consequently over the regulation of navigable waters. The existence of this power has enabled the federal government to pass the Navigable Waters Protection Act, which requires federal approval of all works built in navigable waters. Because the courts have adopted a generous definition of navigability, virtually any provincial scheme involving a large scale dam on a river requires federal approval under this legislation. However, the use of the federal regulatory power under this head must be motivated by a _bona fide_ concern to protect navigation and cannot be used to support a comprehensive scheme of water management.

(b) Fisheries

The federal jurisdiction over fisheries also provides the central government with a secure legal basis for involvement in most major water projects, which inevitably interfere with fish in some manner. Although federal involvment under this power must be related to the management of fish, it supplies the central government with a substantial lever with which to ensure a measure of provincial co-operation in the planning of major water projects.

The basic view provided by the provincial perspective over water is therefore one of provincial ownership and legislative power, limited by the existence of a federal jurisdiction which exists only for a number of specific purposes. This legal view of provincial jurisdiction has certainly been reflected by provincial practice, because many projects which either impair the water quality or reduce the flow of inter-provincial waterways have been approved with a minimum of consultation with either the federal government or downstream jurisdictions. However, it is often asserted that the federal government has a wider jurisdiction over water and the basis for this argument will be explained in the following section.

2. The Federal Case

Some commentators on constitutional law would agree with the basic picture of jurisdiction set out above, but would envisage that the federal government could play a much greater role in water management by virtue of the declaratory power and the residual power under the Constitution Act.

(a) The Declaratory Power

Under the well-known s. 92(10)(c) of the Constitution Act, the Parliament of Canada is given the entirely self-serving power to declare a work "to be for the general advantage of Canada or for the advantage of two or more of the provinces." By virtue of such a declaration, the federal Parliament can assume jurisdiction over even a local work and its ability to do so is virtually unlimited. However, because of political considerations, the federal government has been less inclined to use the declaratory power in recent years and it has not been used at all since 1961. It obviously has potential application in many water projects, but is probably of limited practical utility because of its political repercussions.

(b) The Residual Power

A number of commentators have argued that the federal residual power to legislate for the "peace, order and good government of Canada" gives the federal government much greater jurisdiction over water than the account in the preceding seciton of this paper would suggest. It is difficult to evaluate this view becaue the ambit of the peace, order, and good government power is notoriously controversial. It is clear that the power can support legislation that is not within the normal jurisdiction of the federal government in an emergency, which could possibly arise, for example, in the case of extreme water pollution, although it is debatable whether pollution of a river flowing between two provinces could be characterised as a "national" emergency. In addition it is clear that federal legislation under the residual power might also be justified in certain circumstances if its subject matter is one of "national concern." It has been argued by some commentators that this test would permit federal legislation in the area of pollution control, at least in inter-provincial rivers. There is also some judicial support for the view in *Inter-provincial Co-operative Ltd. v. The Queen*, which will be discussed in Part C of this paper. In that case, Pigeon J. suggested that the regulation of pollution in inter-provincial waters might well be the subject of federal control under the peace, order and good government power. A similar argument could be made that the diversion of interprovincial waters might also be a matter of federal jurisdiction.

In the absence of any definitive legal authority, the only conclusion that can be drawn on this issue is that the peace, order and good government clause might justify a greater federal role in the regulation of inter-provincial waters. However, such legislation would be open to attack and might be contrary to some prevailing assumptions of constitutional law. In addition, the federal government has taken a more limited view of its own power in existing water legislation. For example, the Canada Water Act provides for the management of water quality by federal-provincial co-operation and permits unilateral federal action on water quality only when efforts to procure co-operation have failed and "the water quality management of [the waters in question] has become a matter of urgent national concern." This approach evidences both respect for the traditional limits of the peace, order and good government power and the co-operative manner in which water management has generally been carried on in Canada.

3. The Effect of s. 92A of the Constitution Act

The celebrated "resources amendment" to the Constitution Act, which was passed in 1982, gives the provinces exclusive jurisdiction over many aspects of non-renewable natural resources. The restriction of the general application of this section to non-renewable resources precludes an argument that it increases provincial jurisdiction over waters and apparently this arose as a matter of deliberate choice, because water had been included in some earlier drafts of s. 92A. However, an argument may arise under s. 92A(1)(c) that the provinces have gained jurisdiction over water at the expense of the federal government. That section provides that a provincial legislature has exclusive jurisdiction over the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy." It might be argued that this exclusive authority permits a province to place a dam for hydro-electrical purposes at any location of its choice and without any federal interference. However, it seems that a more reasonable interpretation of this clause would permit the province to choose the rate, pace and location of hydro-electrical development, but that in doing so it must respect established heads of federal jurisdiction. For example, there is nothing in s. 92A that permits a province to detract from federal authority over navigation so that it probably could not use that section as a justification for building a hydro-electrical facility in a navigable river without federal consent. A similar argument can be made on the relationship between s. 92A and the existing federal heads of jurisdiction over fisheries and peace, order and good government. However, in the absence of any guidance from court decisions on provincial powers under s. 92A, its extent remains a matter of some speculation.

4. The Implications

The lack of clear definition in questions of federal-provincial jurisdiction over water has both negative and positive implications. On the negative side, the absence of a clearly justified federal role in respect of inter-provincial waterways may on occasion have led to assumptions of provincial sovereignty over water, with the result that provinces have felt that they could authorize the diversion or pollution of inter-provincial waters with impunity. It seems that such an attitude prevailed at the time of the construction of the Bennett Dam on the Peace River in British Columbia. On the other hand, uncertainty as to the jurisdiction of each level of government, while commonly regarded as undesirable, may be beneficial, because it encourages co-operation before major water projects are undertaken. As neither the federal nor provincial governments can be sure of the outcome of litigation over inter-provincial rivers, it would be extremely rash for one level of government to undertake a major project without the co-operation of the other. The need for this cooperation seems to have been particularly well-recognized in respect of major western water projects in the last few years.

C. THE RELATIONSHIP BETWEEN CONSTITUTIONAL LAW AND CONFLICT OF LAWS

Jurisdictional questions in respect of inter-provincial waters have traditionally been viewed from the perspective of the federal government on the one side and the provinces on the other. However, the development of inter-provincial waters may well pit one province against another or against a territory or put private interests in one province against private interests in another. This topic raises a possible conflict with Mr. Giroux's paper on inter-provincial issues, but it will be dealt with in this background paper because of its clear constitutional implications.

1. The Nature of the Problem: Inter-provincial Co-operatives Ltd. v. The Queen in Right of Manitoba

For many years, Canada's water managers appeared to work under the reasonably safe assumption that an upstream province enjoyed virtual sovereignty over waters within its boundaries. Provided that federal jurisdiction over navigation and fishing were not infringed, it was assumed that the upstream province could authorize the pollution or reduction in flow of those waters without fear of serious legal repercussions in downstream provinces. However, this assumption has been challenged in a number of cases and particularly by the Supreme Court of Canada decision in the Inter-provincial Co-operatives case.

That case raised a difficult question of conflict of laws because the injurious act of water pollution was licensed in the province in which the act occurred, but not in the downstream province, where it caused the most serious damage. The crucial legal issue is whether the tort (or wrongful act) is considered to have been committed in the jurisdiction in which the act took place or in the jurisdiction where the harm was suffered. For many years courts in Canada took the view that the tort was committed in the province in which the act occurred and thus, if the act was properly authorised in that province, denied a remedy to the citizen in the neighbouring jurisdiction. However, recently courts have tended to adopt the view that the tort occurs in the jurisdiction where its harmful effects were felt. This view obviously suggests that a citizen in a downstream province may bring action in respect of harm inflicted by a diversion or act of pollution in an upstream province.

The importance of this theoretical development was emphasized by the Inter-provincial Co-operatives case, in which the operation of chlor-alkali plants in Ontario and Saskatchewan caused the discharge of mercury into rivers that ultimately flowed into Manitoba. As a result of the mercury pollution, it was necessary to close commercial fisheries in Manitoba. The government of Manitoba paid financial assistance to the fishermen who had lost their livelihood and by statute took an assignment of their rights of action in order to sue the operators of the plants.

Manitoba's action was dismissed by the Supreme Court of Canada for a variety of reasons in a long and confusing series of judgments. The majority of the court noted that the acts of pollution were validly licensed in Saskatchewan and Ontario and objected to Manitoba's claim on the ground that it sought to regulate civil rights to pollute that had been lawfully granted in Saskatchewan and Ontario. However, the court appeared to ignore the converse of this proposition, which is that if Manitoba cannot interfere with civil rights in Ontario and Saskatchewan, then nor could those provinces by their domestic legislation interfere with the rights of Manitoba citizens to clean water. Chief Justice Laskin and two other members of the court viewed the litigation in this light and considered that an upstream province could not validly license acts within its own boundaries that had injurious consequences in other jurisdictions. The majority of the court did not directly contradict Chief Justice Laskin's views on this point and when his comments are added to the increasingly favoured theory that a tort is committed in the jurisdiction where its harmful effects are felt, it must be recognized that a major development on inter-jurisdictional waters may well give rise to an action in a downstream province or territory.

2. The Implications of the Inter-provincial Co-operatives Decisions for Prairie and Northern Waters

The Inter-provincial Co-operatives case creates the potential for litigation by a downstrewam jurisdiction in respect of a water project in an upstream province. Any litigation of this nature would raise difficult issues of conflict of laws and constitutional law. In addition, it would force Canadian courts for the first time to explore the nature of the law applicable to interprovincial rivers. It might, for example, simply apply the law of riparian rights to such rivers and hold that the downstream province is entitled to receive the flow of the stream without substantial reduction in volume or impairment in quality by the upstream province. Alternatively, the courts might adopt from American law the view that inter-jurisdicational waters must be equitably shared between neighbouring states.

The possibility of litigation raised by the Inter-Provincial Co-operatives case has had a considerable impact in western and northern Canada, because of the fact that major planned water development projects in British Columbia and Alberta have potential downstream effects in neighbouring jurisdictions. It is impossible to predict with any accuracy how a court might resolve major litigation over inter-provincial waters and the resulting uncertainty creates a strong incentive in all parties to negotiate a co-operative arrangement on the sharing of inter-jurisdictional waters. However, the crucial fact remains that the efforts to secure co-operation may be unsuccessful and that the downstream jurisdiction, or one of its citizens, may commence legal proceedings in respect of a dam in the upstream province. If this occurs, Canadian courts will be faced for the first time with the challenge of developing a law of inter-provincial rivers which is at the present time only embryonic in nature.

APPENDIX E. MEMORANDUM ON INTERPROVINCIAL ISSUES BETWEEN QUEBEC AND NEWFOUNDLAND

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Introduction

Interprovicial issues between Newfoundland and Quebec come down to one fundamental issue between the Government of Newfoundland and Hydro-Quebec over the Churchill Falls hydroelectric powerplant and the Power Contract signed between the Churchill Falls (Labrador) Corporation Ltd. (1) and Hydro-Quebec on May 15, 1969.

This issue has been litigated in a number of different courts in Canada and has been the occasion, so far, of two judgments by the Supreme Court of Canada. Most of the arguments and judgments up to this point, have not been concerned with specific water law issues but rather with procedural and contractual questions and with the constitutional validity of legislation affecting property and civil rights outside the territorial limits of one province.

However, the Newfoundland-Quebec issue is relevant to water law if one keeps in mind that under Canadian law, property in water power resources follows that in rivers and river beds, which in the case of Newfoundland, is vested in the Province (2). This is the reason why, as we shall see later, Newfoundland has argued that its legislation purporting to cancel the lease it had granted CFLCo was valid as being legislation dealing with "property and civil rights" within the Province and "public lands" within the Province.

(Sections 92(13) gives the provinces exclusive power to legislate concerning "property and civil rights" within the province and s. 92(5) confers on the provinces exclusive power to legislate concerning the "management and sale" of the public lands.

One of Joe Smallwood's dream had always been to produce electricity from Churchill Falls (formerly known as Hamilton Falls) in Labrador. He succeeded in interesting a group of British and international corporations in the creation of British Newfoundland Corporation Ltd. or Brinco, in 1953, for the purpose of power development. In 1958, by federal letters patent, Brinco incorporated Hamilton Falls Power Corp. whose objects were the production, acquisition, transmission and sale of electricity and the harnessing of water for such purpose. In 1965 the Company name was changed to CFLCo.

By a lease signed on May 16, 1961, the Lieutenant-Governor in Council granted CFLCo the right to harness the hydraulic forces in that part of the Churchill River referred to in the lease as the "Upper Churchill Watershed" (which includes the Churchill Falls) to develop its hydro-electric resources and to export the power and energy therefrom outside Newfoundland. Such right was granted for a term of 99 years with an option to renew it for another 99-year term. The lease was specifically authorized by the Churchill Falls (Labrador) Corporation Ltd. (Lease) Act (4). The right to export such power from the Province was subject to a proviso in the lease reading as follows:

> "Provided that upon the request of the Government consumers of electricity in the Province shall be given priority where it is feasible and economic to do so."

In 1963, Hydro-Quebec became a stockholder in CFLCo by virtue of the nationalization of the Shawinigan Water and Power Co. whose portfolio included CFLCo stock. Hydro-Quebec's participation in the project soon became essential both because its engineers and solved the problems involved in the transmission of electricity over long distance and because financing such an undertaking was not possible without a stable purchaser of electricity.

In June 1966 a Letter of Intent was signed between Hydro-Quebec and CFLCo under which the latter undertook to build the power plant and to sell its electricity to Hydro-Quebec. The Letter of Intent recognized that the purchase of power by Hydro-Quebec was essential to the feasibility of the project and that the Power Contract would have to meet the requirements of lenders regarding security fdor the repayment of debt.

In fact, the original plan was to sell a large part of the production in the U.S.A. so as to obtain U.S. funds in order to repay American lenders. After 1966, it became evident that American power producers were not interested because, at that time, nuclear energy appeared to be cheaper.

American lenders then required that Hydro-Quebec increase its participation in the project and that its "take or pay" obligation subsist until full repayment of the loans. In the end, American lenders advanced about $500 millions and Hydro-Quebec $100 millions. ("Take or pay" meant that Hydro had to pay for contract amounts of electricity whether consumed or not, and even in the event of a "force majeure" making delivery impossible).

Between 1967 and 1969 no less than nineteen drafts were required for the final Power Contract which was signed on May 15, 1969. Under its terms CFLCo agreed to supply and Hydro-Quebec agreed to purchase at Churchill Falls for a term of forty years, which is renewable at the option of Hydro-Quebec for a further term of twenty-five years. Provision was made for CFLCo to retain 225 megawatts (M W) for use within Labrador by its subsidiary Twin Falls Corp. Furthermore, CFLCo could recall on three years minimum notice up to 300 megawatts to meet the needs of the Province of Newfoundland.

The price to be paid for electricity was based on the final capital cost of the project. It averages a little over 3 mills. For the second 25 year-term the price drops to two mills since, at the time, the loans will have been repaid. Hydro-Quebec must pay about $96 millions for the first 40 years and about $63 millions thereafter.

Each party was to be responsible for the construction of transmission lines on its side of the Quebec-Labrador boundary.

Lines and other facilities were to be built according to Hydro-Quebec's specifications.

Under the contract Hydro-Quebec agreed to make funds available for the completion of the project over and above the $700 million to be raised by CFLCo in exchange for mortgage security. If CFLCo lacked the funds necessary to meet debt service payment, Hydro-Quebec agreed to advance the necessary monies in exchange for debentures and shares of CFLCo.

Hydro-Quebec agreed to compensate CFLCo should interest payments exceed specified rates of 5 1/2 and 6 percent. Such compensation amounts to an average of $14 million a year. In order to make possible the total financing of the project, Hydro-Quebec itself purchased $100 million of bonds secured by a general mortgage. This financial involvement increased its participation to 34.2% of the issued shares of CFLCo. Although a minority shareholder, Hydro-Quebec is protected by a voting trust arrangement providing that no substantial changes in the financial or other obligations of CFLCo can be made without the consent of 75% of the shareholders.

Finally, the power Contract provided that it would be governed and interpreted in accordance with the laws of Quebec and that only the courts of Quebec would have jurisdiction to adjudicate disputes over the Power Contract, subject to ordinary appeal rights and procedures.

The plant was built on schedule. The delivery of power to Hydro-Quebec began in 1971 and the completion date under the contract fell on September 1, 1976.

In 1974, the government of Newfoundland acquired by purchase from Brinco all its common shares in CFLCo and transferred them to Newfoundland and Labrador Hydro. The issued common shares of CFLCo are thus currently held by Newfoundland and Labrador Hydro for 65.8% and by Hydro-Quebec for 34.2%.

The Contract Litigation

Problems arose in 1974. At that time the Newfoundland Government wanted to develop the Lower Churchill Falls known as Gull Island and had acquired all of Brinco's interests in Gull Island Power Company which Brinco had incorporated by federal letters patent. In order to finance the project Newfoundland needed a buyer for at least 1200 M W since its own needs for power were for about 800 M W out of a potential 2000 M W for the Gull Island project. Hydro-Quebec, at that time, could not absorb such power since the James Bay Project was already under construction and there was then no sale opening in the United States.

In January 1976 the President of Newfoundland and Labrador Hydro, by letter to the President of Hydro-Quebec, requested 600 M W from Churchill in addition to the recapture of the 300 M W already foreseen in the contract. The answer from Hydro-Quebec was that it was possible to meet the request for an additional 600 M W but that the cost of such energy would be the replacement cost fof 600 M W.

This reply did not satisfy the Prime Minister of Newfoundland, Mr. Moores, who then wrote the Prime Minister of Quebec requesting 800 M W from Churchill Falls starting in 1983 at the contract price, under threat of legal proceedings. Mr. Bourassa refused.

On August 6, 1976, the Government of Newfoundland, purporting to exercise a right under the proviso in the 1961 lease to CFLCo, requested CFLCo by an Order in Council, to supply to Newfoundland and Labrador Hydro 800 MW of power generated from the Upper Churchill Falls Watershed, commencing on October 1, 1983. By letter dated 31 August 1976, the President of CFLCo declined to comply with the order in Council because of its commitments to Hydro-Quebec and because they haa been advised by counsel that meeting the terms of the Order in Council would constitute default under both the Power Contract and the First Mortgage Trust Deed.

In September 1976 the Government of Newfoundland commenced an action in the Newfoundland Supreme Court against CFLCo and Hydro-Quebec requesting a declaration that under the 1961 else it was entitled to make the request for 800 M W and that CFLCo was obliged to comply with the request made in the Order in Council. After a number of procedural motions and appeals, the matter was heard before M. Justice Goodridge of the Newfoundland Supreme Court who rendered judgment against Newfoundland on July 6, 1983.

According to M. Justice Goodridge, the proviso in the 1961 lease meant that only energy not already committed and made available for sale could be purchased by the Newfoundland consumer when it was feasible and economic for CFLCo to supply such power. Thus, the energy committed for sale to Hydro-Quebec was not available for sale to another customer and, at present, there was very little if any energy available in excess of that already committed to Hydro-Quebec. That judgment is currently under appeal before the Newfoundland Court of Appeal.

In 1977, Hydro-Quebec instituted proceedings before the Superior Court in Montreal requesting a declaration against CFLCo and the Government of Newfoundland that only the Quebec courts were competent to adjudge disputes between the parties arising out of the Power Contract and that should CFLCo reduce the sale of electricity to Hydro-Quebec in order to meet the terms of the Order in Council, CFLCo would be in breach of the Power Contract. There were a number of preliminary objections to these proceedings which had to be decided by the Quebec Superior Court (5), the Quebec Court of Appeal (6) and the Supreme Court of Canada (7). The Supreme Court decided that the Province of Newfoundland, not being a party to the Power Contract, did not come under the jurisdiction of the Quebec Superior Court. The Court aslo decided that if the Newfoundland Courts had jurisdiction to interpret the proviso of the 1961 lease, the Quebec Courts had jurisdiction to decide whether, should CFLCo comply with the Newfoundland request for 800 MW, this would constitute a default under the Power Contract. The Newfoundland courts had already declined to decide that question (8).

The case then came back to the Superior Court of Quebec for adjudication. The Superior Court held that compliance on the part of CFLCo with the request for 800 M W made by Newfoundland would constitute a breach of contract entitling Hydro-Quebec to recover damages under Quebec law and would not be akin to a " cas de force majeure" (Act of God) (9). This decision is under appeal before the Quebec Court of Appeal (at the time of writing, June 1, 1984).

The Reversion Act and its Validity

In 1980, the Prime Minister of Newfoundland, Mr. Peckford, became dissatisfied with existing court actions which had been underway for 4 years and were considered unpredictably lengthy and inadequate.

On November 21, 1980, the Newfoundland Government introduced in the Provincial House of Assembly the Upper Churchill Water Rights Reversion Act. Its essential provisions were as follows:

1 - Under sections 4 to 7, the Lease Act and the 1961 lease are repealed and all rights and interests arising under the repealed statute and lease revest in Her Majesty in Right of Newfoundland free and clear of all encumbrances of claims.

2 - Under section 8, and for greater certainty, it is specifically provided that the hydroelectric works of CFLCo vest in the Crown.

3 - Section 9 provides for the payment to secured creditors for all indebtedness which has arisen under the lease for the works done and created pursuant to its terms.

4 - Section 10 makes provision for compensation to shareholders of CFLCo for any reduction in the value of their shares occasioned by the coming into force of the Act.

5 - Section 12 limits the payment of compensation to the extent provided by the Act and bars any rights of action in respect of any loss or damage resulting from the enactment.

The Act provided for a reference to the Newfoundland Court of Appeal before the Act came into force in order to test its constitutional validity. It received Royal Assent on December 17, 1980 and the reference was presented to the Newfoundland Court of Appeal on February 10, 1981. On March 5, 1982, the Court of Appeal declared the Reversion Act to be intro veres the Legislature of the Province of Newfoundland. (10) An appeal was taken to the Supreme Court of Canada which, by a unanimous judgment rendered on May 3, 1984 reversed the judgment of the Newfoundland Court of Appeal and declared the Reversion Act to be unconstitutional.

The first question to be decided by the Court was whether extrinsic evidence in the form of an affidavit by Hydro-Quebec's chief counsel and exhibits attached thereto was admissible. The affidavit set forth the circumstances surrounding the Churchill Falls power development and the negotiations leading to the execution of the Power Contract. Exhibits to that affidavit included correspondence, copies of speeches and declarations of officials and members of the Legislature in Newfoundland, copies of an explanatory pamphlet to bondholders at the time of the passing of the Reversion Act. All of this evidence was tendered on the question of the Newfoundland government's policy regarding the Power Contract.

Except for speeches and public declarations, such evidence was judged admissible, not as an aid to the construction of the legislation, but to ascertain not only the operation and effect of the legislation but its true object and purpose, especially since it was impugned on the ground that its real purpose was to interfere with rights of parties outside the Province.

CFLCo contended that the Reversion Act was ultravires of the Legislature of Newfoundland because it had the effect of impairing the status and essential powers of a federally-incorporated company. This argument was rejected by the Supreme Court. The Court held that since the Act had the effect of expropriating all of the assets of CFLCo and made provisions to compensate the shareholders and creditors but not the company, it had the effect of depriving it of its former business but did not affect its corporate structure. The mere fact that such expropriation was not general in character and was aimed at a particular right did not render the legislation more invalid as applied to a federally incorporated company than it would be as applied to a provincial company or a natural person. CFLCo would still be a corporation in being and its capability to raise new capital and issue shares would be left intact.

The next contention submitted to the Court was that the Reversion Act was ultravires as interfering with civil rights outside the Province. According to section 92 of the Constitution Act 1867, the exclusive right of a provincial legislature to make laws in relation to subject matters therein enumerated is limited to the confines of the province. Section 92 (13) gives the Province exclusive legislative authority over "property and civil rights in the Province" and (16) is also limited to matters of purely local or private nature within the Province.

The Court decided, on the relevant authorities, that a provincial statute is not ultravires if its "pith and substance" is in relation to matters falling within its legislative compentence even if it has incidental or consequential effects on extra-provincial rights. If its "pith and substance" is derogation from or elimination of extra-provincial rights it is ultravires even if there is a colourable attempt to preserve the appearance of constitutionality.

The Court then applied that principle to the Reversion Act. Extrinsic evidence that had been held admissible by the Court demonstrated that the true purpose of the legislation was aimed at the Power Contract both to secure Newfoundland's access to 800 M W of Churchill Falls power and to renegotiate the price paid by Hydro-Quebec. Furthermore, the structure of the statute itself revealed its true purpose, as stated by Mr. Justice McIntyre speaking for a unanimous Court:

> "Even the Reversion Act itself provides for compensation to shareholders and creditors directly, rather than to CFLCo, thus depriving the company of any assets upon which recovery by Hydro-Quebec for breach of the Power Contract could be effected. As soon as the Reversion Act came into force, Hydro-Quebec's right to receive power according to the terms fo the Power Contract would be effectively destroyed. Even if the flow of electricity to Quebec continued at the same rate and for the same price after the coming into force of the Act, it would then be in the form of a privilege rather than an enforceable right. All of this, in my opinion, points to one conclusion: the reversion Act is a colourable attempt to interfere with the Power Contract and thus to derogate from the rights of Hydro-Quebec to receive an agreed amount of power at an agreed price." (11)

Thus the Court held that the true purpose of the legislation was to interfere with the right of Hydro-Quebec under the Power Contract to receive an agreed amount of power at an agreed price. Interference with this right to the delivery of power in Quebec, being situated outside Newfoundland, was beyond the competence of the Newfoundland Legislature, and the Reverison Act therefore was unconstitutional.

Conclusion

The Quebec-Newfoundland issue is not over yet, being still litigated both in Quebec and in Newfoundland after eight years. In fact the issue is also fought in another forum since Newfoundland has systematically opposed Hydro-Quebec's applications to the

National Energy Board for licencs to export power to the United States and has even requested leave from the Federal Court of Appeal to appeal the Board's decision to grant Hydro-Quebec licences to export power to PASNY (12).

After a partial and summary review of the extent of the litigation involved in the Churchill Falls power controversy, one can ask whether it was worth the expenditure and whether a solution could not have been reached in an easier way through negotiation. Obviously one can only assume that Newfoundland's attitude is that there is nothing to lose in trying to resolve this issue in the Courts. On the other hand, eight years of negotiation might have produced a compromise which, if not perfect for either side, might have proven acceptable. The judgments rendered so far in this matter seem to indicate that the courts are not willing to reopen such contracts as the Power Contract, or to substitute their opinions for negotiated agreemetns in the settlement of interprovincial issues.

References

*The author is indebted to Me Andre Gadbois, Chef counsel for Hydro-Quebec, who provided much of the information upon which this memorandum is based in an interview on May 29, 1983.

1- Hereinafter cited as CFLCo.

2- Newfoundland Act, Schedule, Terms 33, 35, 37.

3- See also: Andre Gadbois, "les tribulations judiciaries de la mise en valeur hydroelectrique de la riviere Churchill", (1981) 22 Les Cahiers de Droit, 839.

4- S.N. 1961, c. 51, am. 1963 c.2; 1964 c.43; 1966-67 c.83; 1968 c.101; 1969 c.77; 1970 c.62.

5- Commission hydroelectrique de Quebec v. Churchill Falls (Labaradore) Co. Ltd. Unreported, C.S. Montreal, no 500-05-011130-778, August 5, 1977, J. Reeves.

6- (1980) C.A. 203.

7- (1982) 2 S.C.R. 79.

8- A.G. for Newfoundland v. CFLCo, (1980) 109 D.L.R. (3d) 146 (Nfld C.A.).

9- Hydro-Quebec v. Churchill Falls (Labrador) Corp. Ltd., (1983) C.S. 604.

10- Reference Re Upper Churchill Water Rights Reversion Act, 1980, (1982) 134 D.L.R. (3d) 288.

11- Opinion of McIntrye, at pp. 50 -51 of the judgment.

12- National Energy Board Act, R.S.C.C, c N-6, 18.

APPENDIX F. LEGAL ISSUES CONCERNING NORTHERN WATER RESOURCES

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I. Jurisdiction

Before examining the current legal regime affecting water in the Yukon and Northwest Territories, the administrative structure must be put into context. Although the Territorial Governments have matured significantly over the last several years, they are each still an administrative arm of DIAND. Their commissioners are civil servants responsible to the Minister of DIAND and they are largely dependant on that Ministry for their fiscal arrangements. The problems which arise from this relationship and from the fact that this same Minister is responsible for administering the majority of legislation affecting northern land and resources include:

(1) Conflict of Interest

- Not only is the Department charged with the responsibility of protecting the interests of native peoples but it has a mandate to promote northern resource development projects -- two activities which are often in direct opposition to each other. Moreover, through its responsibility to regulate northern lands and resources, DIAND is also largely responsible for enviornmental management and protection.

- DIAND is often in the position of funding a project at the same time it is regulating it (e.g., municipal water treatment where the Water Board, with the Minister's approval, issues a licence but in turn, the Territorial Government must get the funds from DIAND before the terms of the licence can be implemented. The Minister can thwart the Board's decisions by simply not providing funds).

(2) Overlapping Jurisdictions

- Legislation concerned with preventing and prosecuting pollution of northern waters involves a variety of different federal departments (DIAND, DFO, DOE, Ministry of Transport) and the Territorial governments.

- The regulatory "maze" respecting Northern resource has been well documented (see the Drury Report on Constitutional Development in the N.W.T. (1980) and the Special Senate Committee on the Northern Pipeline (1983)). While bureaucratic complexity can serve a useful purpose in slowing the pace of a development project, Northern environmental and social interests can be prejudiced when that complexity extends to enforcement of pollution violations.

- Although DIAND is the lead agency for all non-renewable resource based activities in the North, there is often competition and disagreement among the other agencies which also have jurisdiction. With each having a different philosophy and interest to defend, there is often confusion within the bureaucracies as to who is doing what and for which purpose (i.e. appropriate mitigation measures, clean up responses, compliance, monitoring and enforcement). Often in the case of spills, insufficient evidence is collected or inadequate political/administrative will exerted for a prosecution to proceed.

- Is the Water Board an appropriate vehicle for co-ordinating these agencies with respect to discharge of wastes into northern inland waters? If so, can this be accomplished through regulations under NIWA and/or political will?

- The Drury Report acknowledged the efficacy and need to transfer control over non-renewable resources including water to the Territorial Governments. Would this alleviate some of the duplication and improve efficiency? Should there be a revitalization of co-ordinating mechanisms?

(3) Transboundary or Interjurisdictional Matters

- Initially, the GNWT was allowed only observer status at interjurisdictional negotiations respecting proposed hydro-electric projects on the Slave and Liard Rivers. However, the GNWT has since obtained signatory status respecting the master agreement and seven bilateral agreements. What is the nature and consequence of this status? Should the Canada Waters Act and NIWA be amended to reflect this delegation by the Minister? What are the further responsibilities and rights of the Territorial Governments? What rights do downstream communities and traditional native peoples have with respect to alterations in water quality, rate and flow; i.e. to whom would they have recourse for compensation, for which heads of damage and what authority would they have for enforcing it?

- No piece of legislation concerned with Northern inland waters touches on the issue of export of water resources. Do the Territorial Governments and native peoples have rights independent of the interests of Canada? If so, what are they? Can appropriate amendments be made to the Canada Waters Act or NIWA respecting authority to control whether export takes places at all, and if so, under what conditions?

- What clout would they have for ensuring compliance?

(4) Omission from any Protective Jurisdiction

- Some situations are not covered by any safeguards. MacLeod (1977) cites the example whereby Strathcona Mines sought initially to deposit wastes from their mine in Strathcona Sound. Not being an inland water, the Water Board could not regulate or licence such an activity and there were no regulatory provisions under the Arctic Waters Pollution Prevention Act which set general standards for authorizing the discharge of wastes into Arctic waters. (There is now a regulation setting the maximum amount of oil which can be spilled but that is for experimental purposes only. See issues under Arctic Waters Pollution Prevention Act.)

(5) Future Jurisdictions

- To date, aboriginal rights to water have not been acknowledged in any formal way. This situation is being addressed to some extent through the aboriginal rights negotiations which are currently taking place throughout both territories. In addition to ownership of lands adjacent to and forming the beds to lakes and rivers (COPE), native groups are also seeking management over water as a resource within their claim area (TFN).

  - Will there be separate water use allocation mechanisms within the claims areas?

  - If yes, how will they interact with each other and with the existing Water Boards?

  - If no, will the Water Boards have jurisdiction over allocation of water use on top of or adjacent to native owned lands?

  - Can the priorities of native people seeking to maintain a traditional lifestyle be "integrated" into water resource planning such that their rights and their lifestyle are protected? If so, how can that best be accomplished?

  - What will the rights of the native land owners be? Riparian Rights? Aboriginal Rights? Private Rights?

  - What do these rights, if they do exist, consist of and how will they affect or be affected by management, planning and development schemes concerning northern waters?

- Northern political develoment is continually evolving. Changes being contemplated include provincial type status for both Territories and division of the N.W.T. into two separate entities.

  - Should division occur, would yet a third water board be created for Nunavut? Would it be an entity different than that proposed by TFN at the negotiations table?

  - Would a Nunavut Water Board have or share any jurisdiction over waters among the Arctic Islands?

  - The Territorial Governments and the Drury Report recommend that the Water Boards be responsible to a Minister within their governments. Given the importance of regulating land, water and resource use to resource development, the DIAND bureaucracy and Minister are reluctant to relinguish political, legal or administrative control over inland waters. The need for further devolution in this areas is slow to be recognized and acted upon. How can it be expedited?

- Recent initiatives have been undertaken in DIAND (Ottawa) which will have an impact on resource allocation in the North.

At the same time, the N.W.T. Water Board is undertaking measures to develop water quality standards and water use priorities to assist them in planning and managing water use. Given that the land use planning initiative includes the "conservation, development and utilization of land, resources, inland water and the offshore," how should these processes be co-ordinated? How will either mesh with current reviews on Northern regulation, environment and conservation?

II. Legislative Framework

Despite the fact that there are in excess of 15 peices of legislation concerned with various aspects of water in Northern Canada, there are three which contemplate broad regulatory, planning and management functions: The Canada Waters Act, the Northern Inland Waters Act and the Arctic Waters Pollution Prevention Act.

(1) Canada Waters Act

Although this Act has been in force for almost fifteen years, it is virtually unused in the Northern context. No water quality management areas have been established and no comprehensive water management plans have been formulated to date although the capability is there. Given that it is under the responsibility of the Minister of Environment and not DIAND, this potential might be important *vis a vis*:

- Interjurisdictional or transboundary agreements.
- Water resource management within the North including:
  - Water quality and quantity standards, control and regulation.
  - Planning and implementation of plans re. conservation, development and utilization of water resources.
  - cost benefit analysis of such plans.
  - public hearings re. water resource plans.
  - establishment of water quality management areas.
- Inspection, monitoring and enforcement of effluent and pollution violations.

(2) Northern Inland Waters Act

(a) Scope and Jurisdiction

As its name suggest, NIWA provides a more regional focus than the Canada Water Act. Most importantly, it creates a Water Board in each of the Territories, the objects of which are "to provide for the conservation, development and utlization of the water resources of the Yukon Territory and the Northwest Territories in a manner that will provide the optimum benefit therefrom for all Canadians and the residents of the Yukon and Northwest Territories in particular." (s. 9) The Act itself purports to apply to all uses of water except those for the purpose of domestic use, fire extinguishment or flood prevention on an emergency basis. However, the regulations to NIWA limit even further the situations where a licence is required from the Water Board.

With respect to the scope of their activities, the following problems or questions arise:

- Despite the mandate of both Boards to plan for and manage the use of Northern waters, activities to date have primarily been concerned with licencing water intake and waste disposal regimes of municipalities and non-renewable resource development. In particular, the latter has been on an ad hoc, first come first served basis, not related to or based upon traditional native land or water use.

- The N.W.T. Water Board has established guidelines for Municipal Type Wastewater Discharges in the N.W.T. (1981) which accept as a precept that "the discharge of raw municipal waste water should be eliminated due to the unique relationship of northern residents to inland waters." While these guidelines are laudable, the same "rule of thumb" has not been applied to industrial waste which potentially may be far more detrimental. These guidelines refer to projects on an individual basis. At what point will the cumulative effects on a water body become detrimental?

- Discussions have been initiated in the N.W.T. with respect to planning for the development of water quality standards and water use priorities, but the method for determining them has not been arrived at. Once determined, will the Minister promulgate them as Regulations? If they remain as guidelines, they will not be enforceable.

- With respect to licencing, there is no requirement for a water user to apply to the Board (or DIAND) for permission to use water if that use is for the purposes listed in the Act (see above) or if they fall within s. 11 of the NIWA Regulations. That section authorizes water use without a licences if it is

  "a) for municipal purposes by an unincorporated settlement or a construction camp,
  b) for water engineering purposes; or

  c) for any purpose not referred to in paragraph (a) or (b), at a rate not in excess of 50,000 gallons per day."

- Previously these types of uses required an authorization from the Water Controller, a DIAND employee. Now they are being handled to some extent through the land use permitting process. Coupled with the fact that this Act places no requirement on a polluter to report a spill, the Water Board is left in an information vacuum. What recourse is there against an unlicenced water user who deposits wastes in water? What if the water is not deleterious to fish or if the waters are not frequented by fish?

- The Water Board in the N.W.T. takes the position that the intent of NIWA was to give management of all water use to the Board. Consequently, any water user must apply for a licence and the Board will determine whether a particular use falls within section 11 of the Regulations. If it does, the Board issues a "letter of exemption" from the licencing process with the proviso that if any waste is to be deposited into Northern inland waters, a licence must be issued.

- Is the current regime effective in terms of environmental protection, administrative efficiency and public input into decision-making. What are the alternatives and how can they be implemented?

(b) Board Composition

Currently, the Boards consist of nine members, six of whom are appointed by the G.N.W.T. and three by the Federal Government. In the N.W.T., three members are native and three are civil servants employed by DIAND, EPS and National Health and Welfare. Although NIWA provides for appointment of inspectors and analysts, no such person has been appointed to be responsible to or be employed by the Board.

However, the Boards have access to the technical expertise within the DIAND, DOE, and Territorial Government.

- Should Board members, representative of particular departments, levels of government, native organizations or interest groups be direct employees of and responsible to that agency? Or should appointments be independent but sympathetic?

- What independent technical resources can or should be made available to representatives of native organizations or environmental or municipal interest groups?

- The Board sits at hearings en masse, complying with its quorum requirement of five. While this ensures equitable and informed participation from all concerns on major matters, administration becomes cumbersome and unwieldy for more routine matters. What models are available which would satisfy the needs of northerners for public input and control while increasing the efficiency and decreasing the expense of decision making?

- The Boards have no technical staff (other than legal) directly responsible to them. Consequently, they are unable to carry out functions of surveillance, compliance, monitoring and enforcement of the very licences which they issue. Should the Boards take on a full range of bureaucratic responsiblities ranging from "law maker to policeman"? Or can a more effective mechanism be developed within the government by shifting the locus of decision making?

(3) Arctic Waters Pollution Prevention Act (AWPPA)

Because this Act applies to marine waters surrounding the Arctic Islands it may not be within the scope of the Commission's considerations. However, those lands and waters, by boundaries defined in the N.W.T. Act, fall within the geographic boundary of the N.W.T. Furthermore, AWPPA provides the framework for regulating water use from a waste disposal and transportation perspective. These are increasingly important issues given the rate of offshore drilling and tanker traffic. Not only have there been a number of oil spills in the area (11 in COGLA Annual Report 1983) but tanker traffic has the potential of impacting the waters, fish, sea mammals and economy of the Inuit. (Icebreakers leave ice rubble in the winter which is difficult to cross and cause noise which is thought to disturb fish and sea mammals.)

Although the Minister of Transport has responsibility for administering AWPPA, the Minister of DIAND has responsibility for COGLA activities on Canada Lands, the Beaufort Sea -- Mackenzie Delta and the Arctic Islands -- Eastern Arctic Offshore. [The Minister of EMR has responsibility over COGLA activities in Hudson Bay, Nova Scotia Offshore, and Grand Banks and Labrador Sea.) Neither the Act or regulations provide for public input of any kind even though standards are being set prescribing the type and quantity of waste which can be deposited and the conditions under which such waste may be deposited (i.e. oil spilled for experimental purposes), times and location of drillship placement and liability of operators.

- Should regulations of the Arctic Waters come under more strict public scutiny? Can this be done by sharing jurisdiction with existing Water Boards?

- Should there be an Arctic Waters Board?

BIBLIOGRAPHY

Gilmour, J.G., Legal Perspectives of Water Management in the Northwest Territories (Revised - December 1983), Department of Justice and Public Services, GNWT.

Hardin, Michael, Enforcement Procedures Manual - Draft for Environment Canada, Environmental Protection Service, Northwest Region, No date.

LaForest, G.V., Water Law in Canada - The Atlantic Provinces, Information Canada, Ottawa, 1973.

Lucas, A.R., Western Canada Water Resources Law, Background Report #32-6 for Nature's Lifeline: Prairie and Northern Waters a publication by Canada West Foundation and Devonian Group of Charitable Foundations @ 1982.

MacLachlan, Spaulding and Johnson, Laws Affecting Land and Resources in Denendeh, Dene Nation, 1983.

Macleod, Water Management in the Canadian North, the administration of Inland Waters North of 60°, CARC, 1977.

Rueggeberg and O'Farrell, Mackenzie River Basin Project, Revised outline September 21, 1983.

Zbeetnoff, Water Management and Native Land Claims: Problems, Issues and Alternatives for the Canadian North, Winnipeg, 1979 (for DIAND).

Legislative Affecting Northern Inland and Marine Waters

Canada Waters Act

Northern Inland Waters Act

Arctic Waters Pollution Prevention Act

Canada Oil and Gas Lands Act

Oil and Gas Production and Conservation Act

The Fisheries Act

National Energy Board Act

Northern Canada Power Commission

Navigable Waters Protection Act

Environmental Contaminants Act

Dominion Water Power Act

National Transportation Act

Migratory Birds Convention Act

Criminal Code

National Parks Act

Canada Shipping Act and Regulations to Implement the International Convention for the Prevention of Pollution of the Sea by Oil

Public Health Ordinance

Environmental Protection Ordinance

Pesticide Ordinance

Public Utilities Ordinance

Flood Damage Reduction Agreements Ordinance

APPENDIX G. INDIAN RIGHTS TO WATER IN THE PRAIRIE PROVINCES

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INDIAN RIGHTS TO WATER IN THE PRAIRIE PROVINCES

Fresh water is a natural resource of the most fundamental importance to all life on this planet. Canada has been blessed by an abundance of it. It has been reliably estimated that 26% of the world's fresh water in storage (9% of the flow to the sea) is found in Canada. This figure may be as high as 40% if you include all of the shared resources with the U.S. (for example the Great Lakes) plus ice in storage. Yet Canada has less than 1% of the world's population.

The Great Divide area of the Rocky Mountains (which forms the boundary between the Provinces of Alberta and British Columbia) contains glaciers which feed three oceans. Most of the major river systems of the Prairie Provinces are fed from the eastern slopes of the Rocky Mountains. They flow across Alberta, Saskatchewan, Manitoba, and the Northwest Territories and drain into Hudson Bay and the Arctic Ocean. They provide an abundant and continuous supply of fresh water that is essential to the economy of the Prairies. Water is a far more significant natural resource than oil. But because it is a renewable resource, and because Canadians have always had an abundant and cheap supply it will probably take something like the Arab oil crisis to make Canadians realize the value of this resource, and to act quickly to conserve it and maximize its use. When that sort of action is taken, will we have a legal regime over water that is adequate to settle competing claims to its use? It is the purpose of this paper to examine one of those claims, namely, the claims of the Native Indians to all water found on their Reserves.

The significance of Indian rights to water is readily seen when one considers the following statistics. Irrigation districts in Southern Alberta account for 7% of the arable land in Alberta. They also account for approximately 20% of Alberta's agricultural production. Some crops such as soft-white wheat, sugar beets, and alfalfa could not be grown economically without irrigation. Approximately 80% of the water supply to these irrigation districts and the potable water supply of 48 communities is potentially constrained and affected by Indian Reserves because the head-waters flow through or alongside Indian Reserves and in many cases the impounding and diverting dams and canals are located within or alongside those Reserves.

In the Prairie Provinces there are 333 Indian Reserves covering approximately 3,681,197.9 acres which equals 7.6% of the total area of the three Prairie Provinces. Many of these Reserves have water boundaries or large rivers and lakes within the Reserve area.

Do the Indian Bands on these Reserves have any greater rights to the use of this water than the farmers or ranchers immediately adjacent to those Reserves whose land is also bisected or bordered by the same rivers or lakes? The answer to that question may lie in the future delineation of the aboriginal and treaty rights recognized and affirmed by Section 35 of the Canadian Charter of Rights and Freedoms. That is a topic for another paper. But it is a topic which will be addressed in light of the historical and constitutional background of the right to water (especially flowing water) in Canadian law, and particularly on the prairies. It is this background that I propose to discuss in this paper. I will use the Alberta experience as my example, but in most instances I believe that experience is duplicated in Saskatchewan and Manitoba. It should also be noted that the constitutional and jurisprudential history of water law on the prairies is different in some very significant particulars from the original Provinces of Confederation.

Normally, water can be conveniently divided into three categories, namely:

(1) Flowing water in defined channels on the surface - creeks, streams, rivers, etc.;

(2) Standing water on the surface - ponds, sloughs, lakes, etc.;

(3) Underground water.

Section 91(24) of the Constitution Act gives the Federal Government exclusive jurisdiction over "Indians and Lands reserved for the Indians" (underlining is mine). These lands (known as "Reserves") within any province are usually considered to be virtually an enclave of Federal jurisdiction such that the province has no power to legislate directly so as to affect the use of that Reserve land or the Indians' usufructuary rights over it. The question of whether Provincial laws of general application throughout the Province can apply to Reserve lands needs final clarification by the Supreme Court of Canada, but until then the better opinion seems to be that such laws do not apply to Reserve land even though, by virtue of Section 88 of the Indian Act, they do apply to Indians living on those Reserve lands except to the extent that such laws are inconsistent with the Indian Act or any Regulations or By-Laws made under it.[1]

Accordingly, when one contemplates the construction of any control structure on the bed of a river or lake on a Reserve it is critically important to know whether that bed is part of the Reserve, and therefore under the exclusive legislative authority of the Parliament of Canada, or whether it is not part of the Reserve and therefore under the exclusive legislative authority of the Provincial Legislature. It is also important to have an understanding of the common law as to ownership of the bed of a body of water.

The common law of England developed principles of ownership of the bed (or "alveus", or "solum") of any river or lake. The North-west Territories Act, S.C. 1886, c. 60, s. 11 (as amended 60-61 Victoria, Chapter 28) introduced the common and statute law of England into what is now Alberta and Saskatchewan in the following terms:

> Section 11
> "Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories insofar as the same are applicable to the Territories and insofar as the same have not been or are not hereafter repealed, altered, varied, modified, or affected by any Act of the United Kingdom applicable to the Territories, or of the Parliament of Canada or by any ordinance of the Lieutenant Governor in Council."
> (Underlining is mine)

The law of England on July 15, 1870 dealing with ownership of the alveus was as follows. In the absence of evidence to the contrary, there exists a presumption that where a non-tidal river, whether navigable or not, forms the boundary between properties each proprietor owns the bed of the river "ad medium filium aquae" - to the centre thread of the water. In the case of an owner of land whose property was bisected by a river the owner was presumed to own the bed under the river. However, for navigable rivers the "ad medium filium aquae" rule is not the law in most parts of Canada. Even before provinces started to abolish private ownership of the beds of rivers and lakes by statute,[2] the judges had found the English common law rule to be inapplicable to navigable rivers on the prairies[3]. In doing so they had recourse to the old common law rule (set out by Blackstone) that British settlers carried with them only so much of the English law as was applicable to their new situation and to the condition of the infant colony. They also noted that in the early days of exploration and settlement of Canada, and particularly Western Canada, the rivers and lakes were used as aqueous highways, and therefore the presumption that led to private ownership of the beds of navigable rivers and lakes in England was found not to be applicable to navigable rivers and lakes in Western Canada.

The concept of a "public aqueous highway" means that the critical issue becomes the question of whether or not a particular river or lake is, in fact, navigable. If it is navigable the courts take the view that a grant from the Crown did not include the alveus because the right to navigate existed prior to any such grant. In effect, a public aqueous highway had been established prior to the grant. Therefore, the English common law rule was reversed, namely, the presumption was that the alveus remained in the Crown unless the Crown expressly included it in grants of land bordering navigable rivers or lakes.[4] For non-navigable creeks or streams the English common law rule would apply, except that in some provinces it has been changed by statute.[5]

One of the best descriptions of the significance of navigability and its effect on riparian ownership of the bed of rivers and lakes in Canada is found in the decision of Anglin J. (as he then was) in Keewatin Power Company v. Town of Kenora, 1906, 13 O.L.R., 237. This case dealt with the Winnipeg River, but it contains extensive authorities regarding other cases in Canada prior to 1906 in which it was held that the bed of the river did not pass to a riparian owner with respect to International rivers, large waterways like the St. Lawrence River and the Great Lakes. After an exhaustive review of the authorities the trial judge concluded at page 262 as follows:

> "When the raison d'etre of the English ad medium rule as applied to non-tidal navigable rivers is understood, and the peculiar conditions under which it became established in England are appreciated, English authorities no longer present formidable obstacles to the acceptance of the proposition enunciated in the many strong expressions of opinion by our own Judges which I have quoted. In our rivers which are navigable in fact, because the public rights in them are recognized to have always existed, ex jure naturae, the title to the alveus must be presumed to remain in the Crown unless expressly granted. It follows that a Crown grant of lands bordering upon such rivers gives title to the grantee only to the water's edge."

This decision was overturned by the Ontario Court of Appeal (16 O.L.R. 184) which held that the English rule did apply because the words of the Ontario Judicature Act were absolute and unqualified and that Act incorporated the Law of England as it stood on October 15, 1792. However, the views of Anglin J. eventually prevailed because Ontario subsequently passed the Bed of Navigable Waters Act - I George V Cap. 6, (1911), (now 1980 RSO Cap. 40). This Act reverses the English common law presumption by legislating that

> "where land has been heretofore, or shall hereafter be granted by the Crown, it shall be presumed, in the absence of an express

> grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land."

Moreover, Anglin J. went on to become Chief Justice of Canada and he was Chief Justice when the Supreme Court of Canada decided the King v. Fares (1932),S.C.R. 78. That case involved the bed of Rush Lake, a non-navigable lake in Saskatchewan. Fares held grants from the Crown of fractional sections of land that bordered Rush Lake. Over the years the water level in Rush Lake lowered very considerably so that some 3,900 acres were reclaimed. The question was whether what had once been the bed of the lake belonged to Fares or the Crown.

The court examined the Territories Real Property Act, S.C. 1886, c. 51 which introduced the Torrens System of Land Registration into the Northwest Territories. The court concluded that it was a reasonable inference from Parliament's enactment of the Territories Real Property Act and the Dominion Lands Act, S.C. 1886, c.54, that there was an intention that the English presumptive rule of ownership to "ad medium filium aquae" did not apply to grants of land under those Acts. Therefore, the patents covered only the acreages specifically set out in them. Anglin C.J.C. noted that under the Territories Real Property Act the section lines were to be the "true and unalterable boundaries" of the section. Accordingly, Fares got only the exact acreage described in the conveyance and no more. If the "ad medium filium" rule were to apply Fares would get much more land than his grant described, and the Court found that would be contrary to the intent of the Act. The Headnote summarizes the conclusion of the Chief Justice of Canada as follows:

> "The Dominion Statute Law in force when the patents in question were issued indicated, as the proper inference therefrom, an intention to exclude the application of the rule (ad medium filium aquae) to grants of Crown lands in the Northwest Territories."
> (The bracketed part is mine)

It is my understanding that all the Indian Reserves in Western Canada were not legally set aside until after passage of the Territorial Real Properties Act and the Dominion Lands Act. The date of the Privy Council Order defining and confirming the boundaries of many of these Reserves is May 17, 1889. Therefore, by parity of reasoning, one can conclude that when these Reserves were set aside the Government of Canada did not intend to convey a usufructuary title to the bed of navigable rivers and lakes within those Reserves.

There is a further reason why the beds of navigable rivers and lakes within Indian Reserves may not be a part of the Reserve, and therefore, may not come within the words of Section 10 of the Natural Resources Transfer Agreement (1930) as being "lands included in the Indian Reserves within the province".[6] In the last quarter of the 19th Century the whole of Western Canada was being surveyed by Dominion Lands surveyors. This was a monumental undertaking and only as it was completed did the Dominion Government have sufficient legal descriptions to support the Orders in Council setting aside the Indian Reserves. When one examines the instructions issued from the Surveyor General of Canada to the surveyors in the field, as well as the manner in which the township diagrams were prepared, it is very clear that the surveyors were instructed to differentiate between larger (navigable) and smaller bodies of water (e.g. small streams, lakes, sloughs, etc.). This was because the larger bodies of water were always reserved to the Crown and no settler got title further than to "the edge of the bed of the lake or navigable stream". Thus, acreages were calculated to the banks and not to the centre of larger (navigable) lakes or rivers. Moreover, the earliest township maps were multicoloured and larger bodies of water were always coloured blue, in contrast to yellow used for swamps and sloughs and black lines used for smaller streams.

Up until 1930 there was no jurisdictional problem with regard to navigable rivers and lakes in Indian Reserves on the prairies because all the land was still under the jurisdiction of the Federal Crown. However, with the passing of the Natural Resources Transfer Agreements (British North America Act 1930) the interest of the Federal Crown in all Crown lands in the Prairie Provinces was transferred to Manitoba, Saskatchewan and Alberta. Under the terms of those agreements certain Federal lands were excepted from those transfers. Section 10 of each of the Transfer Agreements excepts Indian Reserves. This was done because of the provisions of Section 91(24) of the Constitution Act. The wording of Section 10 of the Natural Resources Transfer Agreements is to the effect that all lands included in Indian Reserves within the province

> "...shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada..."

If, however, the beds of navigable rivers and lakes within those Reserves had never become part of the Reserves, it follows that this was land that was transferred to the provinces and the provinces would have jurisdiction over the alveus. In this way, navigability becomes a very critical concept in determining who has jurisdiction over a particular river or lake on an Indian Reserve.[7]

This is not the place to go into an extensive analysis of navigability. However, it should be noted that navigation on rivers in Western Canada was extremely important because the rivers were critical communication lines prior to August, 1883 when the railroad finally reached Calgary, Alberta. Moreoever, one must remember that navigation is a Federal subject matter, having been reserved to the Federal Government under Section 91(10) of the Constitution Act. Whether a river is navigable or not is a finding of fact in each case. From the numerous cases dealing with navigability one is able to extract the following tests and propositions:

(1) Is the river in its natural state capable of use by the public for purposes of transportation and commerce?

(2) It is not the extent and manner of that use that is determinative, but its capability for such use. Many cases put a heavy emphasis on the river's capability for commercial use - as opposed to non-commercial use.

(3) Natural interruptions to navigation on some parts of a river, which can be readily overcome, do not prevent it from being held to be a navigable river. For example, falls and rapids, sandbars and shifting channels have not prevented a finding of fact that a river is navigable.

(4) A river can be found to be navigable even though there are lengthy periods of low water during which it is not navigable. On the other hand mere depth of water without profitable utility will not render a water course navigable in the legal sense.

(5) If a river is declared to be navigable at a certain point it is deemed to be navigable from that point downstream to its mouth.

My own test is that if you can throw a sack of flour in a canoe and paddle it on the river or lake in question it is likely the courts will find that body of water to be navigable, providing it connects two points such that it can be considered to be part of a waterway and, as such, publicly useful. With spring fed lakes there will probably be an argument as to whether the lake is part of a navigable waterway. My theory is borne out by a recent Ontario case dealing with Bronte Creek a stream just west of Toronto. In Coleman vs. Attorney General of Ontario 1983, 27 R.P.R. 107 the Colemans claimed that Bronte Creek was navigable, therefore its bed was owned by the Crown pursuant to the Ontario Beds of Navigable Waters Act, therefore, their property, which was bisected by Bronte Creek, did not require planning permission for a sub-division using the creek as the boundary. The Judge reviewed the case law as to navigable waters and found that Bronte Creek has been in the past, and is now capable of navigation for canoes and other shallow craft on a seasonable basis, at least from Lowville to its mouth in Lake Ontario when water levels are high enough to clear natural obstacles such as rapids. There was no evidence that boats or other craft were used to transport freight or produce by the early settlers since the early development of a good network of roads made this unnecessary. However, in the early 1800's saw mills and grist mills were established on the stream. He concluded that the stream, which currently is being used for canoeing and, in winter, for snowmobiling and cross country skiing, is of a public character (a public aqueous highway) and is navigable in law. It would seem that most courts are now tending to find even small streams to be navigable, providing they have some public character about them and are wide enough for canoeing.

If I am right in this conclusion, it follows that Provincial Governments in Western Canada are going to have more jurisdiction over the beds of rivers and lakes within Indian Reserves than they had previously imagined. Nevertheless, they will still need the cooperation of Indian Bands in any development of control structures on those waters because the Indian Bands still have usufructuary title to the banks, as well as the land which gives access to those structures. Moreover, the Province would have to obtain from the Federal Government the usual clearances necessary under Federal Legislation such as The Navigable Waters Protection Act, The Fisheries Act, The Northern Inland Waters Act, The Prairie Farm Rehabilitation Act and The International River Improvements Act if an international river is involved. If any pollution is involved, The Canada Water Act, and The Migratory Birds Convention Act, may be applicable.[8]

A recent case involving a weir on the Oldman River within the Peigan Reserve southwest of Calgary is an illustration of the need for this type of cooperation. In that case the Alberta Government had to negotiate with the Peigan Band for a right-of-way to access the weir and flume which was the source of one of the major irrigation systems in Alberta. The weir and flume were located within the boundaries of the Peigan Reserve. These negotiations resulted in the Province of Alberta paying the Peigan Band $4,000,000 as initial consideration, together with a per annum sum of $300,000, plus an inflation factor. For this sum the Province of Alberta received a permit for the road access to the weir, plus a small amount of additional land required for the reconstruction and expansion of that system, plus some other considerations not significant for our purposes. This settlement has fueled the expectations of other Indian Bands in Alberta which have rivers flowing through their Reserves.

More recently, the Blackfoot Indian Band, located east of Calgary on a Reserve comprising 470 square miles issued a claim for $350,000,000 based on their perceived losses from the water in the Bow River that has been diverted into another major irrigation system within the Province of Alberta. The Bow River bisects the Blackfoot Reserve. The diversion of this water was accomplished by the Bassano Dam which was constructed by the C.P.R. in 1914 on land expropriated from the Blackfoot Reserve by the Federal Government. This case brings me to my next topic, namely, what rights of ownership can be asserted over the actual water standing on, or flowing through, Indian Reserves?

Non-navigable lakes[9] within an Indian Reserve are part of the Reserve and the Band would have usufructuary rights over the bed and the water in it. Provincial Legislation purporting to vest ownership of all water in the Provincial Crown (e.g. Alberta Water Resources Act, Section 2) would likely be ineffective against the Band for the reasons previously given (see footnote #1). Moreover, at common law, standing water is part of the land.[10]

Non-navigable streams may be in a different category from non-navigable lakes, because traditionally, the law has had no concept of ownership in flowing water, as opposed to standing water. The water, in the stream, as distinct from the bed of the stream, is not the subject of absolute ownership at common law.[11] Whether flowing water (like flowing air) is capable of ownership by anyone (even the Crown) is an interesting point.[12] In Alberta, the Provincial Crown claims a proprietary interest in all water, both flowing and standing.[13] So does the Federal Government in the territories over which it still has jurisdiction, namely, the Yukon and the Northwest Territories.[14]

However, in the case of Indian Reserves within a province, the enclave theory appears to prevent provincial Water Resources Acts from applying. Furthermore, under the Indian Act (Section 81) the Federal Government has specifically delegated to Indian Band Councils the right to make by-laws not inconsistent with the Indian Act or with any regulation made by the Governor in Council or the Minister of Indian Affairs, for, inter alia,

> "the construction and maintenance of water courses... ditches... and other local works", and "the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies"

Therefore, I conclude that Indian Bands have the capacity to deal with non-navigable standing bodies of water on their Reserves as if they had a proprietory interest in those waters, and they can construct control structures on non-navigable streams, and otherwise deal with non-navigable flowing water, subject only to the rights of other riparians at common law. Some Indian Bands, such as the Peigan Band in Alberta, have already proposed elaborate by-laws dealing with water on their Reserve.

As we have seen, the question of whether a body of water is navigable is a judgment call in each situation. If it is navigable it is quite likely that it was in fact excluded from the survey of the Indian Reserve and, if not expressly included in the Reserve, the presumption is that it was excluded. Thus it is not subject to the Federal 91(24) jurisdiction. Because the Provincial Crown owns the bed of those navigable rivers and lakes one would normally expect that the Provincial Legislation would apply to the waters lying on top of those beds. Thus, for instance, Alberta would claim a proprietary interest in those waters pursuant to Section 2 (1) of the Alberta Water Resources Act. Alberta's disposition of this proprietary interest would of course be subject to the Federal Government's legislative jurisdiction over those same waters by virtue of the Navigable Waters Protection Act and The Fisheries Act etc. Moreover, since the land up to and including the banks of the river is burdened by the usufructuary interest of the Indian Band that Band would, at minimum, have the rights given all other adjoining owners under Section 2 (2), & (3) of the Alberta Water Resources Act. However, the more important question is whether Indian Bands have greater rights to those waters by virtue of:

(a) Normal riparian rights beyond the restricted rights given by Section 2(2) and (3) of the Alberta Resources Act;

(b) Prior appropriation,

(c) Treaty rights,

(d) Aboriginal rights.

These are legal questions that have been litigated extensively in the United States and are just now coming to the fore in Canada. Much further research is needed because there are still some very fundamental issues to be settled. For instance, the common law has always held that there is no property in flowing water. One of the obvious reasons being that it is flowing. Thus, for instance, how can Alberta say it owns the water in the North Saskatchewan River at Lloydminster, Alberta, when the next minute that same water is in Lloydminster, Saskatchewan? Is that not akin to Alberta saying it owns the air flowing over it, even the birds flying in that air? And if the Crown does have a property interest in flowing water, will it pay compensation when that water escapes and does damage by rivers flooding, etc.? I am inclined to read down all declaratory claims to a proprietary interest in flowing water before it has been captured and contained. In my view, the legislative intent of all such statutes is fully realized by regarding the proprietary claims as "legislative overkill" and reading each statute as if the Crown was declaring that it has the sole and exclusive right to use of all water within its jurisdiction in the Province. Even this is a very broad use of declaratory power because with a few strokes of the pen it confiscates (usually without compensation) the common law right of an owner to use standing water on his land as he sees fit. Nevertheless, the history of severe droughts in Western Canada, and the development of arid lands by irrigation, to say nothing of the modern need to control pollution, has necessitated changes in the common law approach to water rights.

Similarly, Provincial Statutes which declare the beds of all water bodies to be vested in the Crown confiscate land which an owner often has within his certificate of title, and on which he and his predecessors in title have paid taxes since the grant issued.[15] Can it be that the legislature really intended that the whole of the Province should be resurveyed to eliminate all beds of all water bodies from private titles? Moreover, wouldn't there be a rush of claims for back taxes paid under mistake?

Please note that it is not just Provincial Crowns which have legislated in this manner. The Federal Crown initiated this legislative approach in the North-west Irrigation Act, S.C. 1894, c. 30 as amended by S.C. 1895, c. 33. Moreover, the Federal Crown has utilized it in the Northern Inland Waters Act.

Unless one disregards these extravagant claims to actually own the water, as opposed to owning the right to use the water, it is difficult if not impossible to make any sense of the legislative disposition of water on Indian Reserves. By way of example, take a Reserve that was legally set apart in 1889. At the time it was set apart the Indian Band would undoubtedly have usufructuary right to all non-navigable standing water on their Reserve. Nevertheless, five years later the North-west Irrigation Act passed by the same government that has legislative authority over Indians and lands reserved for Indians, passed a statute which had the effect of declaring that ownership of all water could be separated from the land on which it was found.[16] In 1930 the Federal Government transferred those same lands to the Provincial Governments of the Prairie Provinces with the exception of lands in Indian Reserves and lands in National Parks.[17] The 1930 Act said nothing about the water on those lands, presumably because at common law water was always considered a part of the land. In 1938, the Prairie Provinces had doubts as to whether the interest of the Federal Crown in the water and water-powers within the Provinces had been transferred and vested in the Provinces under the terms of the 1930 Agreement. Therefore, they entered into an amending agreement which amended the 1930 Agreement by adding to the transfer any interest of the Federal Crown in the waters and water-powers within the Provinces under the North-west Irrigation Act and The Dominion Water Power Act.[18] As we have seen, that interest had been expressed as a proprietary interest separate from ownership of the land beneath the water. However, it was a proprietary interest in water "for the purpose of this Act", namely, irrigation purposes, which, in effect, is only a right to use water. Moreover, the 1938 amendment does not include any amendment to the sections in the 1930 Agreement excluding Indian lands and National Park lands, from the 1930 transfer, i.e. the parties did not extend the 1938 Agreement to specifically state that water and water-powers on those Federal lands were excluded from the transfer to the Province. Does this omission mean that the Province has the property in all water and water powers in Indian Reserves and National Parks? I think not. In the first place it would be most unusual if the constitution could be changed by an omission such as this. In the second place, it seems most likely that in 1938 the Federal Crown did not have any rights to water on Indian Reserves which it could transfer to the Provinces. Even if the Federal Crown had intended to take ownership of all water on Indian Reserves by the provisions of the North-west Irrigation Act, 1894, (as amended), which I doubt, there is no evidence that the Federal Crown expropriated (pursuant to the provisions of the Indian Act) the usufructuary right it had conveyed to the Indians when it set apart their Reserves. One should note that many of these Reserves were set apart before the North-west Irrigation Act was passed. In these circumstances there is a strong argument that not only is the 1894 North-west Irrigation Act limited in scope, but it is also inapplicable to Indian Reserves because it was a law of general application throughout the Northwest Territories, but the land in Indian Reserves was not subject to these laws because it had been "set apart".[19] For these reasons I believe the words used in the 1938 amendment, namely, "the interest of the Crown in the waters and water-powers within the Province under the North-west Irrigation Act and The Dominion Water-power Act" refer to Canada's right to use all water within the Province as expressly set out and limited by those Acts. This would exclude the right to use water on lands excluded from the 1930 transfer. As we have seen that means Indian Reserves and National Parks, at least until the Supreme Court of Canada clarifies this issue - see Footnote #7.

A second fundamental issue that has to be addressed is whether Indian Bands are subject to the new legal regime over water first introduced by the North-west Irrigation Act of 1894. That Act radically altered the common law by declaring that the property and right to use of all water is in the Crown, and by introducing a statutory scheme of allocation of water resources. Although it was introduced to respond to the need for large irrigation projects after years of drought on the Prairies, the Act indulges in the legislative overkill I referred to earlier because it regulates appropriations of water for all purposes. It forms the basis of the current water use legislation in all three Prairie Provinces. To my knowledge there has not yet been a case in the courts dealing with the question of whether this legislation applies on Indian Reserves. I believe that Provincial Governments are of the view that it does so apply, probably on the basis that the Federal Government extinguished the Indians' usufructuary rights to water by the 1894 Act and transferred them to the Provinces by the 1938 Amendment to the 1930 Natural Resources Transfer Agreement. Moreover, the Provinces would pray in aid the opinion of the Alberta Court of Appeal in Re Stony Plain Indian Reserve No. 135, 1982, 1 W.W.R. 302, and the recent amendment to the Constitution - 92A (1(c)). However, when one considers the Supreme Court of Canada's "enclave" decisions, as well as the B.C. Court of Appeal's decision in the Peace Arch case[20] it is clear that any Provincial Legislation affecting land is ultra vires insofar as it purports to affect Indian Reserve land, National Parks, or other Federal land that could be considered a virtual island in a sea of provincial jurisdiction. Moreover, it seems to me to be very artificial to try to separate the water from the land on which it is found.

At this point it should be noted that even on navigable waterways within Indian Reserves the Indians still have usufructuary rights to the banks of those navigable waterways, and this means that the common law riparian rights would accrue to the Indians and could not be expropriated by the Province even by legislation of general application. If Indian Bands wished to put their land under Provincial jurisdiction in order to get the benefit of Provincial legislation they have to make an absolute surrender of that land and sell it in fee simple so as to extinguish the Indian usufructuary interest and get it out of Section 91 (24) and into Section 92 (13). Since water is so intimately connected with the land, and in my view part of the bundle of rights acquired with that land, and since it can hardly be denied that the treaty setting up the Reserves must have impliedly given the right to the use of water on those Reserves, it follows that under normal constitutional principles provincial legislation dealing with water does not reach so far as to affect water on Indian Reserves. However, as we have seen, navigable waterways within Indian Reserves are most probably not part of the Reserve, and therefore the provincial legislation would be applicable on those bodies of water, subject to the riparian rights of the Indians obtained by virtue of their usufructuary rights to the banks. Accordingly, it is the author's view that within an Indian Reserve the legal regime over water is mixed:

(a) On all navigable waterways the Province owns the bed and has the right to allocate the use of the water on the river or lake, subject only to the Indians' riparian rights as aforesaid, and to Federal legislation affecting such rivers, and any Inter-Provincial agreements relating to the quantity and quality of the water to be passed to the neighbouring Province (e.g. Prairie Provinces Water Board);

(b) On all non-navigable bodies of water within Indian Reserves the Provincial Water Resource Legislation does not apply and, in the absence of any similar Federal Legislation, the Indian Bands can deal with this water on the basis of the normal common law principles of riparian rights, and under By-laws enacted by them, always providing they comply with any applicable Federal Legislation.[21]

Another issue in this area relates to the rights of an Indian Band to abstract water from a navigable waterway flowing through their Reserve. As we have seen, the Alberta Water Resources Act does not require a riparian owner to obtain a licence to abstract water for "domestic purposes". "Domestic purposes" is strictly defined in the Act and does not include irrigation beyond that of ..."a garden not exceeding one acre adjoining a dwelling house on the land of a riparian owner". When one is dealing with a sparsely inhabited Reserve covering 470 square miles in an arid area of southwest Alberta it is clear that a large scale Indian irrigation project using water from the navigable waterway that bisects that Reserve is going to be subject to Provincial licencing, unless it can establish that common law riparian principles entitle the Band to abstract that much water (this is highly doubtful). Therefore, the next question relates to what priority the Province must give an application from an Indian Band for such an irrigation project.

Provincial Water Resource Acts in the Prairie Provinces generally operate on a first come first served basis. In times of scarcity it is last come, first cut off. In trying to forecast how such an application would be dealt with the U.S. experience can be instructive since the historical facts leading up to the establishment of their Reserves are somewhat similar. Nevertheless, one has to be extremely careful because the wording of the U.S. treaties is very different. In many respects it appears that the Reserves in the U.S. have more sovereignty rights than Reserves in Canada - at least until the Penner Report becomes law. Nevertheless, one of the general principles established by the U.S. Supreme Court in Winters vs. U.S.[22] seems reasonable and applicable, namely, that if the right to sufficient water to farm the Reserve area was not expressly contained in the treaty establishing the Reserve it must be implied. Historically, one must remember that the Reserve system both in the U.S. and Canada took nomadic tribes and confined them to a specific land area in the hope that they would adopt the farming way of life introduced by the white settlers, and thereby sustain their people on a much smaller land mass. Accordingly, it is not to be presumed that the representatives of the Queen signing the treaties would have denied the Indians water rights within their Reserves sufficient to establish their people in economical farming operations.

Thus, I see no reason not to apply the principles of priority allocation established in the U.S. pursuant to the Winters' doctrine, namely, that the application from a Reserve is to be treated as at the date the Reserve was established, or, if the Indian Band can establish aboriginal rights to the water, it is to be treated from time immemorial. In most cases that will mean that the Indian Bands have number one priority on any navigable rivers that flow through or along their Reserves.

What then is the effect of this priority in todays market economy? In the U.S. it has become very big business for those Bands situated on rivers in arid areas, for it seems that U.S. courts have taken the next step and accepted that there can be property in flowing water, or at least in the rights to the use of it, without that water having been captured and contained for irrigation purposes. Therefore, Indian Bands can sell their potential prior rights and the quantity is established by calculating the amount of water required to irrigate the potentially irrigable land on the Reserve. In water starved areas of the U.S. southwest this is an extremely valuable legal chose in action. Some Indian Bands in Canada have not overlooked this business opportunity - see the recent actions by the Peigan and Blackfoot in southwest Alberta.

But fundamental questions remain. Is flowing water capable of ownership by anyone, even the Crown? Since fresh water, like air, is so fundamental to the maintenance of all life, can a state allow its citizens to traffic in right-to-use licences?

The Alberta Water Resources Act makes all licences appurtenant to the land or the undertaking specified in the licence so that they cannot be transferred except with the land or undertaking.[23] Moreover, there are numerous provisions in the Act making the licences subject to the Minister's discretionary powers in the event that the work utilizing the water for which the licence was granted is not completed, or is abandoned. Of course, it can be forcefully argued that this virtual prohibition of open sale of water licences only encourages inefficient uses on the part of the current holder of the licence, and that the market economy would do a more efficient job if the licences were not tied to the land. It will be evident from what I have argued that I do not regard the conclusions of some U.S. courts whereby potential rights can be sold, as appropriate in the Canadian legal context. My opinion is that the appropriation must be for a reasonable and actual use, and the licence ceases the moment the use ceases or is changed. Moreover, since I resist any move to sever ownership of water from ownership of the bed on which it is found it is my opinion that only by selling the land can the water rights be transferred.

However, the more important question is the Federal role in water resources and the obvious need to develop stronger institutions based on cooperative federalism in order to regulate the quality and quantity of water in all navigable rivers that are part of an Inter-Provincial waterway. If cooperative federalism fails, the courts can expect more head to head constitutional litigation over water, and if resource sharing principles cannot be worked out by the courts the Federal Government may have to consider legislating under the Peace Order and good Government power or by declaring any works on those Inter-Provincial rivers to be for the general advantage of Canada. One could then expect further litigation over the effect of Section 92A (1)(c) of the Constitution Act.

In times of scarcity it is no exaggeration to say that the way of life of downstream users in other provinces is going to be severely affected by the action of upstream Provincial Governments and water use permit holders, including Indian Bands. An object lesson for us all should be the adverse effects on Alberta, Saskatchewan and the Northwest Territories, plus the $2,000,000 spent by their citizens to mitigate the irregular and low flows in the Peace River, caused by the Bennett Dam in B.C.

This paper was prepared for presentation to the Inquiry on Federal Water Policy by Philip G.C. Ketchum, Q.C.
It was prepared for comment and criticism, and does not represent the views of the Department.

FOOTNOTES

1. There is no doubt that only Parliament has legislative competence over "Lands reserved for the Indians". The most recent decision in the area is "Re Stony Plain Indian Reserve No. 135, 1982 1 W.W.R. 302". In that case the Alberta Court of Appeal stated, at page 322:

> "We accept the general proposition that Provincial Legislation relating to use of reserved lands is inapplicable to lands that are found to be reserved for Indians: Cardinal vs. A.G. Alta., (1974) S.C.R. 695. Moreoever, if land is surrendered for the purpose of leasing, the reversion still remains reserved for Indians, and any Provincial Law impairing the full enjoyment of the reversion will be inapplicable. Finally, even if surrendered lands no longer remain part of the Reserve as defined by the Indian Act, they remain, until finally disposed of, "lands reserved for the Indians" within the meaning of Section 91 (24) and as such, within Federal Legislative and administrative jurisdiction."

On the question of whether Provincial laws of general application apply to Indian Reserves, the B.C. Court of Appeal went even further than the Alberta Court of Appeal. In Surrey vs. Peace Arch Enterprises Ltd. (1970) 74 W.W.R. 380 the Indians had surrendered their reserved land in trust to lease. The land was leased to a developer and the question was whether or not the by-laws of the municipality of Surrey relating to zoning, specifications for buildings, water services and sewers and requirements under the Health Act, R.S.B.C. 1960, 170 were applicable. The developers, who were running an amusement park, claimed immunity. The B.C. Court of Appeal upheld that claim stating that because the Indians retained a reversionary interest in the land, the land remained under the exclusive legislative jurisdiction of Parliament and Provincial legislation could not apply to its use. The Alberta Court of Appeal confessed to having some difficulty with that conclusion of the B.C. Court of Appeal - see Re Stony Plain Indian Reserve No. 135, 1982 1 W.W.R. at page 320. This difficulty seems to have occurred because of the different approach taken to the underlying title to the Reserve (see Note 7 below).

The Peace Arch case was commented on by Martland J. in Cardinal as follows:

> "Once it was determined that the lands remained lands reserved for the Indians, Provincial legislation relating to their use was not applicable".

Thus, it appears that although the "enclave" theory has been rejected as it relates to Indians it may be alive and well as it relates to "lands reserved for the Indians". Alternatively, one can adopt the position of Prowse J.A. in R vs. Twoyoungmen (1979) 16 A.R. 413 at p. 417.

> "Legislation of a Province which purports to be of general application may still be construed as legislation qua Indians or qua land reserved for Indians. An example of such legislation was considered in Peace Arch in which certain municipal planning by-laws, and provisions of the Provincial Health Act were construed as relating to the use of land."

The courts have given little indication as to what factors they will consider in determining whether legislation that purports to be of general application is actually legislation qua lands reserved for Indians, however, some clues are available from a statement of Laskin C.J.C. in Natural Parents vs. Superintendent of Child Welfare (1975) 6 N.R. 491 at 499

> "I cannot believe that any less care should be taken in analysis before subjecting Indians, coming as they do within a specific head of exclusive Federal jurisdiction, to general Provincial legislation, unless the inclusion of Indians within the scope of the Provincial legislation touches them as ordinary persons and in a way that does not intrude on their Indian character or their Indian identity and relationship".

At common law there were no ownership rights over water except as an incident to ownership of the land beneath it, so that historically and constitutionally it would appear likely that Provincial laws of general application dealing with water will be struck down by the courts where they purport to have application to the water on "lands reserved for the Indians".

The fact that the Federal Crown has not legislated to the full extent of its power in relation to Reserve lands and the water on those lands does not have the effect of transferring to any Province the legislative power assigned to Canada by Section 91(24) - Union Colliery Company vs. Bryden 1899, A.C. 580.

These are no longer academic questions because as we have seen Indian Reserves have strategic locations in relation to water. Also there are now two Indian Reserves in Alberta getting into the suburban development game as these Reserves lie on the Western boundaries of the Cities of Edmonton and Calgary.

2. Alberta - Public Lands Act, R.S.A. 1980 P-30, s. 3

3(1) Subject to subsection (2), the title to the beds and shores of all rivers, streams, watercourses, lakes and other bodies of water is hereby declared to be vested in the Crown in right of Alberta and no grant or certificate of title made or issued before or after the commencement of this Act shall be construed to convey title to those beds or shores.

(2) Subsection (1) does not operate

(a) to affect a grant made before or after the commencement of this Act that specifically conveys by express description the bed or shore of a river, stream, watercourse, lake or other body of water, or a certificate of title founded on that grant,

(b) to affect the rights of a grantee from the Crown or of a person claiming under him, when those rights have been determined by a court before June 18, 1931, or

(c) to affect the title to land belonging to the Crown in right of Canada.

4 No person may acquire by prescription an estate or interest in public land or, as against the Crown, in any other land.

3. Fort George Lumber Co. vs. G.T.P. Railway (1915) 9 W.W.R. 17

Flewelling vs. Johnston (1921) 2 W.W.R. 374 (Alberta Court of Appeal)

Re Iverson and Greater Winnipeg Water District (1921) 1 W.W.R. 621 (Manitoba Court of Appeal)

Kennedy vs. Husband; Kennedy vs. Ellison (1923) 1 D.L.R. 1069

Clarke vs. The City of Edmonton (1929) S.C.R. 137

4. There are situations in which the metes and bounds description of the property uses the centre line of a navigable river. For instance, the description of Wood Buffalo National Park uses the centre line of rivers for its eastern boundary. One of these rivers is the Slave River, and Alberta is currently looking at potential hydro electric sites on the Slave River.

5. Alberta - Water Resources Act, R.S.A. 1980 c. W-5, s. 2

2(1) The property in and the right to the diversion and use of all water in the Province is hereby vested in Her Majesty in right of Alberta.

(2) Nothing in this Act requires a person who owns or occupies

(a) land that adjoins a river, stream, lake, watercourse or other body of water, or

(b) land under which ground water exists

to obtain a licence or permit under this Act for the use of as much of that water as he requires for domestic purposes on that land.

(3) A person in the exercise of a right under subsection (2) may pump or otherwise convey water to fill a tank, cistern, trough or dugout without a permit or licence.

6. The British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.) as found in R.S.C. 1970 Appendix II at p. 365

7. The language of Section 10 of the Natural Resources Transfer Agreement seems clear and proprietary (e.g. the word "vesting"). However, Section 1 of the same Agreement sets forth the legislative intent as follows:

> In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of Section 109 of the British North America Act 1867, the interest of the Crown in all Crown lands, mines, minerals, precious and base... shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, ...

For the original Provinces of Confederation the underlying title to Indian Reserves is in the Province since they were the original owner of the land. However, in areas where the Federal Government was the original owner (e.g. Northwest Territories) who has the underlying title to the Reserve? Is it the Federal Crown under Section 10 or the Provincial Crown under Section 1? In the most recent opinion on this subject (Re Stony Plain Indian Reserve No. 135, 1982 1 W.W.R. 302) the Alberta Court of Appeal stated that it was the Provincial Crown. However, this opinion was obiter, and there are conflicting views in other Court of Appeal opinions. Surrey vs. Peace Arch Enterprises Ltd. (1970) 74 W.W.R. 380; R. vs. Twoyoungmen, (1979) 16 A.R. 413 at p. 417; Western International Contractors Ltd. vs. Sarcee Developments Ltd. (1979) 3 W.W.R. 631.

8. Navigable Waters Protection Act R.S.C. 1970, N-19

Fisheries Act R.S.C. 1970, F-14

The Prairie Farm Rehabilitation Act R.S.C. 1970, P-17

Northern Inland Waters Act R.S.C. 1970, 1st Supp. c. 28

International River Improvements Act 1970 I-22

Canada Water Act 1970, 1st Supp. c. 5

Migratory Birds Convention Act, R.S.C. 1970, M-12

9. For the time being I am including in this expression spring fed lakes which are not part of a navigable waterway and which could be classed as private lakes as in Gordon vs. Hall and Hall 1959, 16 D.L.R. 2nd 379

10. Cheshire's Modern Law of Real Property (11th Ed) p. 131

11. Cheshire's Modern Law of Real Property (11th Ed) p. 132

12. In Blackstone's famous Commentaries on the Laws of England (University of Chicago Press Edition, 1979, Volume 2 at page 14) he states:

> "But, after all, there are some few things, which... must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be ferae naturae, or of a wild and untameable disposition; which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy with disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."

13. See Alberta Water Resources Act, cited at Footnote #5 above.

14. Northern Inland Waters Act R.S.C. 1970, 1st Supp. c. 28, s. 3

15. Her Majesty the Queen in Right of Alberta vs. Roland A. Very, Dorothy M. Very et al, 1983, 6 W.W.R., 143

16. The North-west Irrigation Act S.C. 1894 57-58 Victoria, c. 30 as amended by 58-59 Victoria, c. 33

> Section 4
> The property in and the right to the use of all the water at any time in any river, stream, water course, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water shall, for the purposes of this act, be deemed to be vested in the Crown unless and until and except only so far as some right therein, or to the use thereof, inconsistent with the right of the Crown and which is not a public right or a right common to the public is established; and save in the exercise of any legal right existing at the time of such diversion or use, no person shall divert or use any water from any river, stream, water course, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water, otherwise then under the provisions of this Act.

17. Section 10 of the Natural Resources Transfer Agreement

> All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement

> with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

18. The Natural Resources Transfer (Amendment) Act S.C. 1938, 2 George VI, c. 36

19. For instance it seems that Indian Reserves were specifically withdrawn from the operation of the Dominion Lands Act by P.C. Order No. 1694 dated 12 June 1893

20. District of Surrey vs. Peace Arch Enterprises Ltd. (1970) 74 W.W.R. 380 (B.C. Court of Appeal)

21. Someone will ask "What about a non navigable stream that rises within Provincial jurisdiction, flows through the Indian Reserve and back into Provincial jurisdiction - does the Provincial Water Resources Act apply to that stream while it is on the Reserve? Or what about actions on a stream outside the Reserve that have effects on the flow or quality within the Reserve? Since the number of non-navigable streams falling within this category is very limited it is likely that these questions will be answered by negotiation, probably using the common law rights of riparians.

22. Winters vs. U.S., 207 U.S. 564 (1908)

23. Alberta Water Resources Act, section 23 and sections 47 - 53